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No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

JOINT APPENDIX

Volume IV of VII (pp. 1557a-2074a)

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PETITION FOR CERTIORARI FILED MARCH 1, 2002
CERTIORARI GRANTED JUNE 3, 2002

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EXCERPTS OF TRIAL TESTIMONY OF FRED HARTWELL, JULY 17, 1996

[Vol. 25, R. 10280, commencing at p. 225]

* * *

FRED HARTWELL called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. Just to alert the jury, I'm told this witness is from out of town and will be a short witness, and we're going to make an effort to complete him today, but we'll see how it goes.

DIRECT EXAMINATION BY MR. SHULTZ:

Q Would you please state your name.
A Fred A. Hartwell, H-A-R-T -- I'm a little hoarse.
Q Where do you live, Mr. Hartwell?
A 35157 South Flower Street, Littleton, Colorado.
Q Are you retired?
[226] A Yes.
Q How long have you been retired?
A Two years this month.
Q And before you retired, where did you work?
A I worked at State Farm Insurance Company.
Q In approximately the time frame of 19, February and March of 1984, were you working for State Farm?
A Yes, I was.
Q Were you working in the same office as an individual by the name of Bruce Davis?
A I was.
Q And at that point in time were you his supervisor?
A Yes.

Q Mr. Hartwell, I'm just going to show you -- Let me just show you a document that I showed to Bruce Davis a few weeks ago. Can you look at that and just briefly identify what that is?

A This is Bruce Davis' resignation letter.

Q And it says, "Dear friend." Would that be you?

A Yes.

Q Mr. Hartwell, did Mr. Davis in that letter tell you that he was leaving State Farm because he felt [227] he'd been required to do things that were dishonest, fraudulent, and cheating people?

A No, he did not.

Q Did Mr. Davis have a conversation with you at or about that same time, February or March of 1984, at about the time he was leaving, and tell you that he was leaving State Farm because he had been required to do things that he felt compromised his integrity, that he was required to cheat and defraud policy holders and other people?

A No, he did not. In fact, that's the reason I came over here, because I didn't like the negative things that I heard that were being said about me and the company. I have no further interest in this trial.

MR. SCHULTZ: Your Honor, I think I'm going to be the most popular person around. No more questions.

THE COURT: Thank you, Mr. Schultz.

MR. CHRISTENSEN: I'm going to be a while. I'm not sure why the out-of-state witness was put on last while we took a local witness, Ms. Smith first, but I'm happy to finish. But I don't want people upset with me if I take thirty minutes.

MR. SCHULTZ: Well, I'm going to object to anything that goes beyond the scope of direct.

[228] THE COURT: That's a legitimate objection.

MR. SCHULTZ: We have covered all the other things with other people, and I wasn't going to be duplicative. And that's it.

MR. CHRISTENSEN: So we can't get into this man's PP&Rs?

MR. HUMPHERYS: Your Honor, it goes to credibility.

THE COURT: He will -- Ask your questions, but I think that when counsel proffers a witness on a very limited scale, that you're going to have to make a case to me to go beyond that.

MR. CHRISTENSEN: Well, he gave a lot of testimony Sunday under oath that I think his PP&Rs don't support, but I'll obey the judge's ruling.

MR. BELNAP: I'd move to strike that statement, and I'd ask for a bench conference if there needs to be further discussion.

THE COURT: I will grant the motion, and I think that would be appropriate. Let's just proceed with the examination, but the court's view is that we confine the examination to his testimony.

CROSS EXAMINATION BY MR. CHRISTENSEN:

Q Do you have Mr. Davis' personnel file there [229] in front of you?

A I don't know.

Q Can I see it?

A Sure.

Q The personnel file is typically a permanent record at State Farm?

MR. SCHULTZ: Objection, Your Honor, goes beyond the scope of the direct examination.

MR. CHRISTENSEN: He showed him a letter from the personnel file.

THE COURT: Overruled.

Q (BY MR. CHRISTENSEN) Are they typically a permanent record at State Farm?

A Yes, it is.

Q I see documents in here from the early eighties, including PP&Rs.

A Okay.

Q Would you read the date on that PP&R?

A 6-23 -- Excuse me, 6-21-1983.

Q Do you know that State Farm has represented in this case that they don't keep PP&Rs except for two years?

A Maybe not as a permanent file. The PP&R is done to counsel an employee, and at the end of that time period a new PP&R is done, it's routed through channels. [230] I have no idea what the time frame is that personnel department would actually keep a PP&R. Is that what you mean?

Q It's from 1983, isn't it?

A Okay, did that come from personnel?

Q I assume.

MR. SCHULTZ: And that's a misrepresentation of what State Farm has said, too, Your Honor. What they've said is current year plus two. This man left in '84, and this is his '83.

Q (BY MR. CHRISTENSEN) So all the old employees' PP&Rs are still there? All right, getting back to your conversation with Mr. Davis when he left, isn't it true that you told Mr. Davis if you didn't have so many years at State Farm and had your retirement tied up there, and if you were younger, you would leave too?

A Absolutely not.

Q Mr. Hartwell, your current income with State Farm retirement is about $3,000 a month?

A Yes, it's a little over $33,000 a year, and it's paid through an annuity. It's not paid by State Farm, it comes from a bank in New York.

MR. CHRISTENSEN: I've got a lot of other questions, but as I understand the court's ruling, I'm through.

[231] THE COURT: All right. Are you through, as well?

MR. SCHULTZ: Yes.

THE COURT: You may step down, Mr. Hartwell.

* * *

(The jury left the courtroom.)

THE COURT: Please have a seat. Okay, anything anybody wants to bring before the court before we recess?

MR. HUMPHERYS: Yes, Your Honor.

MR. BELNAP: Yes, Your Honor.

MR. HUMPHERYS: I'm very concerned with what [232] has happened with the last witness and our restriction on redirect. Nearly every witness that plaintiffs called, the defendants went well beyond the scope of direct in their cross examination. And the court has allowed them to go well beyond their scope.

And to restrict the scope of our questioning in terms of impeachment, in terms of demonstrating his bias, in terms of showing his practices which he denied Bruce Davis engaged in or told him about, I think is an unfair application of how the court has allowed cross examination of our, of the plaintiffs' witnesses.

And though this witness is now gone, I'm concerned about defendants doing the same thing with some of their other witnesses, who we have not called, and been waiting to cross them on information, and they may specifically narrow the scope of their direct examination to exclude, or to attempt to exclude plaintiffs from obtaining evidence from that particular witness. And so I am registering an objection on the record, and to the court, to express our feelings that we felt that was very unfair.

And we don't know if this is going to be done again, but we should have the right to be able to explore, in all different kinds of aspects, a person's credibility and biases and prejudices. And that area is [233] not necessarily limited to

the specific subject matter which was raised, because bias and prejudice can be shown by a number of different kinds of circumstances.

Credibility can be demonstrated by a number of different circumstances, not just what was raised specifically in a direct question. So that would be one area that we would simply, we would wish to state on the record to the court.

MR. BELNAP: Judge, with respect to this witness, they had PP&Rs of this person and others up on the board with the preceding two witnesses. Their objections before bringing these witnesses was that it was going to be repetitive. And we're falling behind in our schedule in trying to do everything that we can to keep up to have this case finished by the 23rd. That's the first thing.

Second thing, from our perspective, and I guess this is why we have a lawsuit, to some extent, we have been hemmed in substantially by the scope of direct throughout the plaintiffs' case and feel like your ruling was appropriate.

Mr. Humpherys and Mr. Christensen served subpoenas on some State Farm witnesses that they wanted here during their case. We brought a witness up from St. George that they requested be here to testify in [234] their case, they decided not to use him. And when that witness does go on the stand, we think it is entirely appropriate, since they subpoenaed him, were going to call him in their case and decided not to, that they be restricted to the scope of direct that we take that witness into.

Other than that, I cannot anticipate what we may do in this case, other than we're going to try to pare it down so that we can be done, and that's what we're trying to do.

Now, the other thing I wanted to mention, if I can go to another subject.

THE COURT: Well, let me just comment on the record. There's certainly been some latitude given in the scope of cross and direct. A lot of the testimony that's gone beyond that have, most of it has come without objection. And it's not my inclination, at least at this point, to interject myself when I believe there's some testimony that is not objected to that goes beyond the scope. I've done so on occasion, but that isn't my normal practice.

I certainly take into account when that does occur, and I've made it clear that the only basis upon which I would normally allow redirect, except for just minor follow-up matters, is on those occasions in which [235] I have allowed a party to go beyond the scope of direct, that would invite -- I should say recross examination, on redirect -- and that would allow recross examination. But otherwise none. And I think I've been rather firm in doing that, and I think that has aided in getting this matter resolved.

I do agree that there should be some latitude given in attacking credibility, and my intention was certainly to allow a search into credibility. But credibility can also be used as a vehicle for opening a door to ask a party all sorts of questions, and it was, it's my view that when you attempt to make an attack on credibility, that that has to be clear on the questions that are asked and presented as such, and then the court will rule accordingly.

And I think I was, we had an example today with Mr. Reynolds in which I allowed a rather wide ranging examination of him, because I believed it did go to his credibility as a witness, and that's been my inclination.

But when we had a virtually one or two-minute examination of a witness, certainly an attack on credibility would have been allowed, but it wasn't intended to be an open invitation just to go into all sorts of other testimony, and that seemed to me to be [236] what was being invited, and the court denied that.

So I wanted to be clear where I am on it. I'm not saying credibility isn't fair game, but it's got to be a clear credibility attack, and not just a way of opening up another front on a witness.

As far as where we're at on witnesses, I have understood that the plaintiffs put on the case they wanted to put on, and that if they didn't list a witness, that the scope of their examination of defendant's witnesses are going to be confined to the defendant's testimony. And I don't know who this witness is you're talking about. What's his name?

MR. BELNAP: Bob Noxon, Your Honor. They subpoenaed him, Mr. Christensen told us to have him here two successive days, and we brought him up from St. George. And I don't think there was any ulterior motive that I'm implying, here, because witnesses got pushed back. But then finally, after having brought him here, they said, "We're not going to call him."

MR. HUMPHERYS: Your Honor, I think, in fairness -- And Paul, we need to tell the whole story. It is true that we subpoenaed Mr. Noxon. We wanted to make sure that he was coming here. But it's also true that Mr. Noxon, we asked counsel for State Farm whether they were going to call Mr. Noxon, and they said yes, [237] and in fact, he was listed on their witness list. And it wasn't until about a few short days before we concluded when Mr. Belnap, I think it was the Friday before the Tuesday we concluded, or Wednesday, whenever it was we concluded, Mr. Belnap came to me and said, "We've decided not to call Mr. Noxon." And at that juncture we had pretty much had our case finalized, except for the anticipation of having him called by State Farm.

You will note that Mr. Noxon is not on our witness list, because we understood that they were going to call him. Now, he is a critical witness, and his credibility is probably one of the key people's credibility in this case. Though we can't, I guess, argue questions in the abstract.

This was a clear form of gamesmanship, in my opinion, to try to, first of all, say, "We'll call him and we'll have him here," and then to turn around right at the close of our case and say, "No, we've changed our mind, we're not going to call him."

We initially thought about trying to get him here, but our case was well spent at that point, and the judge was putting pressure on us concerning time, and so we said, "Well, if they're not going to call him at all, then we'll call it even."

[238] And now we understand, after the fact, that they have now changed their position again and said, "Okay, now we are going to call him." And it seems like that this was a maneuver to put Mr. Noxon into a position where they could take advantage of this kind of situation.

So now may not be the time to address the issue and the specifics of that issue, but Mr. Noxon is a key player. And I don't think it would be fair for them to call him for a very limited purpose, when all of the documents are out, and all of the testimony's been out regarding him, and then not allow any cross examination beyond a narrow section which State Farm carefully crafts and chooses to ask him about.

And we'll designate him as a rebuttal witness right now if that's going to be the situation.

MR. BELNAP: Your Honor, I don't want to get into a swearing contest with counsel, but I will take great exception to the representations that have been made, here, and the way they've been made about it. And I did not hear any denial that we were told to have Mr. Noxon here, and we had him here from St. George for two days, and then they said they were not going to call him.

They subpoenaed him before this case started, [239] a week before this case started, and made their decision, for whatever reason they decided not to have him, and we were

planning, subject to scheduling to get him on. We are. But we want to have this case finished as quickly as we can.

THE COURT: All right. Well, I'll be clear about this. Noxon's obviously a key player. And certainly an attack on his credibility would be allowed without a lot of limitation. I see him, if he's going to be called, as someone who you're entitled to full examination, so I would certainly view that as a different matter than Fred Hall, and so both sides are on notice on that. I don't have any real hard, I don't have any difficulty in making that decision.

* * *

[241] * * *

MR. BELNAP: Your Honor, two other things. With respect to trying to introduce evidence, again, of a lawsuit in the state of California by a group of female agents against State Farm, at bench conference Your Honor indicated, with Rosa Smith, as was done with Stephanie Stout yesterday, that that was not appropriate.

Mr. Prater brought that out unsolicited in [242] his direct examination, but we think that that area is irrelevant, highly prejudicial, and under 403 we understand, for all of those reasons, it's been denied. And I would ask that if that question's going to be raised again with any witness, that we have an opportunity to approach the bench before the question's been asked.

THE COURT: I think that's reasonable. If you have an occasion to want to do it, just come up and talk to me and tell me what you think.

MR. CHRISTENSEN: I don't have a problem with that. While we're making a record, I'd like to make a record in that. They have now put on several witnesses in the last couple of days to testify that State Farm never discriminates

against women or minorities. I'm aware of at least two cases, the big one in California involving a large number of female employees --

MR. BELNAP: They weren't employees, they were agents.

MR. CHRISTENSEN: Whatever, they were female, who successfully pursued a claim, and I think the total settlement in it was in the neighborhood of $200 million. I mean this was not a small deal. And I think there's one in Texas now that's for females and minorities claiming discrimination. I felt like, where [243] they solicited that testimony from the witnesses, that they had made that relevant.

I had understood yesterday the court's ruling with Mr. Norman was that I couldn't get into the fact he'd been demoted and accused of sexual harassment, and I didn't, and I had understood that I couldn't raise this case with him because the court was concerned that would be a back door way to get into that issue, and I didn't.

I did not understand that that ruling yesterday applied to any circumstance where I could ask the question, or I wouldn't have tried to ask it today. I am more than happy to agree that I won't raise it again without a bench conference.

THE COURT: Thank you, Mr. Christensen. And I didn't take your efforts today to be in any way in bad faith or an attempt to violate the order. I can see the distinction when it was brought to my attention. Go ahead.

MR. BELNAP: Another matter, Your Honor.

THE COURT: Let me just say, on the issue of discrimination, how I heard the State Farm testimony is that they're rebutting the testimony by plaintiff's witnesses that State Farm has singled out various vulnerable groups to low ball claim payments that [244] include, among other things, women and elderly people and those on retirement and so forth. And I don't see a lot of relationship between discrimination suits and that.

Now, if I'm picking up a different perspective on discrimination, I would change my view. But that's what I think I've been hearing, and I see it being different.

MR. SCHULTZ: Your Honor, that, you're exactly right, that was what my point was, and I think it was with Stephanie Stout and with Rosa Smith that that came out, and it may have come out with a couple of others.

But the point was not to get into discrimination in the sense that there's discrimination against employees. Well, it was with Samantha Bird that I asked that question. It was whether, in their claim handling, they were trying to take advantage of people who were perceived in some way to be weaker or unable to deal with the process.

And there had been a suggestion that women fell in that group, as well as others, minorities. I don't know that that's been a major point. But I think retired people, older people, poor people, and so forth. And that was the point.

[245] And I will apologize if I became a little bit exorcised at the bench at this, Your Honor. But I was not talking about the order you made with respect to Mr. Norman. I was talking about an objection that we made to that question regarding Ms. Stout. And I thought Your Honor had, I thought we had had a bench conference about that when the question came up with her, and that you had sustained it.

And it was my impression that it was the same question in the same context. If it was not, I apologize if I became a little too upset about it, but that was why I did.

THE COURT: No apologies necessary. I think the record's clear for tomorrow, we don't have to go any further with it.

MR. CHRISTENSEN: There is one subject that I think that relates. First of all, I think it is relevant, but I'm not rearguing it, I guess I'm making a record. I think if they will

take advantage of their own female agents and their own employees, that's wholly consistent with the claim. And the court's ruled, I'm not going to reopen that.

THE COURT: Okay.

MR. CHRISTENSEN: The other issue -- and my memory may be wrong -- your memory may be better than mine [246] on this, Glenn. I think I asked Mr. McCartney, who's their next insurance regulation expert, if he knew of any class actions. And I believe his answer was just one, and then he mentioned this one, the suit by the female agents.

I plan to ask him and bring out through him that he was not aware of class actions. Maybe he needs to be told, or we need to have an understanding if we're staying out of that, that his answers to that is simply, "No, I didn't know of class actions."

MR. BELNAP: Why can't he just say, "I'm not aware of any class actions that have relationship to claims or a policy"? You know, an insurance policy.

MR. CHRISTENSEN: Well, I think they can't have it both ways.

THE COURT: Well, say, "I'm only aware of one, and it has nothing to do with claims practices."

MR. CHRISTENSEN: That'll be fine. I'll agree to that.

MR. BELNAP: The other issue, Your Honor, is we, this has a thread back through the trial and also to motions in limine that have been ruled on, but we had two bench conferences today on the subject of these cases that were being used to cross examine Mr. Reynolds about. And I just wanted to make a record that we feel [247] that the use of those cases, which were all fire company cases, number one, number two, counsel referring to his summary of the facts or the holdings in those cases where the witness, there was no foundation from this witness that he had any knowledge of

them, and so the purpose to go into those holdings was there was no foundation, even if they were relevant, which we don't believe they are.

We just wanted to cite that for lack of foundation, lack of relevance, prejudice, and lack of similarity to anything relating to Campbell in terms of a third-party auto case, where these were first-party fire cases, just doesn't seem appropriate, Your Honor. And I think that's what we discussed at the bench conference, and wanted to just make a record on that.

THE COURT: Okay.

MR. CHRISTENSEN: I have the court's order, dated May 28th, 1986, in this case on this subject. The court had us produce the list of cases to counsel, which we did some time ago, and the ruling was we were limited in our case in chief, it was expressly allowed that we could use those cases for impeachment in rebuttal. And I guess this is all in writing, I don't need to read it in the record, but I think what, the way we've been using the cases is exactly consistent with the pretrial [248] order issued by the court on this.

THE COURT: Let me just comment, also, on the record. For two reasons. One, I think that, as I understood the testimony and as I ruled on the testimony, it was intended to be impeachment of the witness. And those fire cases have, in my mind, have had legitimacy only to the extent that either they could be tied into the fire, into the auto policies and practices, or auto claims, or could be used for impeachment. At least that was how it was at the initiation of this case.

But I come back again to the wide use of that by defendants in examining witnesses, more than anybody else, I guess, Mr. Crandall is the one I think of, but it has come up repeatedly where there has been testimony elicited on fire company cases and fire company matters, and it seems to me that that door has been certainly opened for a wide use of

those cases for impeachment purposes and for matters which are related. And I'm just, my view is that as this trial's gone on, there's been more and more use of it by the defendant, and that has then invited a response.

Now, as far as these insurance commissioners, I consider this a problematic area, because there certainly is some, there's certainly some contention on [249] the part of the plaintiffs that the insurance commissioners don't really have a very full grasp of what's going on with the insurance company, at least with respect to claims abuses. That's what Prater testified to, and I believe that's what DeLong testified to, and it seemed to me there was at least one other witness.

And then when they're put on and they purport to have such a comprehensive nationwide knowledge and are saying, "Boy, if there was something going wrong, if there was --" You know, when they say pattern and practice, of course that's a loaded term, and a term that we haven't really defined, because it has different meaning under the rules of evidence, and a different meaning in the concept of punitive damages, and a different meaning as to how plaintiffs would use that, and how defendants would use that.

It seems to me that the jury certainly has a right to hear cross examination of a witness that purports to have that kind of comprehensive knowledge to show that, "Well, there are a lot of things he doesn't seem to know about, that seem to have some general significance to the policy holders of this company that he purports to have such knowledge of their fair practices." And that's why I've allowed it to come in.

[250] It seems to me to be fair cross examination in light of the breadth of the testimony that they're offering. And there was nothing limited about the way this gentleman testified today, and that's why I allowed it. So that's, I don't want to spend a lot of time arguing about it, but that's the court's rationale, and that's why that examination was allowed.

MR. CHRISTENSEN: Let me make one other record, as I remember it was a bench conference, it wasn't on the record, and that is that counsel at the bench conference expressed a desire that I not read from the cases, and so I agreed to paraphrase. That wasn't on the record, I said, "I will do my best in good faith to paraphrase. I hope no one will criticize me later if I had a slip of a word here and there."

But it was by, it was from the bench conference that I agreed to paraphrase some facts about the cases, rather than read from them, and that's why that happened.

THE COURT: And I confirm that, and I suggested that you do so in a way that would not load the case with a description that I thought would be unfairly prejudicial, because we were using it for impeachment, not for a way of biasing the witness or the jury in any fashion. I think that's -- Is that [251] everything, counsel?

MR. HANNI: Your Honor, I'd just like to make a comment on that. I think that the way counsel is using those cases is what is so highly prejudicial. The witness has said he wasn't aware of any of those cases. And then to have counsel go on and literally testify is what I think is prejudicial.

THE COURT: Would you like him just to read from the cases? I mean that ruling was based on my reception of you from, I think Mr. Schultz and Mr. Belnap were the ones that were objecting at the time that they didn't want him quoting out of the case. And so if you want it the other way, Mr. Hanni, that doesn't cause me any problems. I felt that it was less of a problem if they were paraphrased than if they just actually stated facts out of the case.

MR. HANNI: Well, I guess what I am talking about, here, is using them at all on cross examination of the regulators. Because to take fourteen cases, or seventy cases out of the millions and millions of claims that are going on,

I don't think is fair cross examination. And particularly when those are litigated lawsuits, and regulators don't get into litigated cases.

And to ask a witness if they're aware of one or two or half a dozen or fifty cases out of thousands [252] and thousands and thousands that are pending in the judicial system, I think is very unfair. And I think to let counsel tell about all the facts of the case and give the name of it and say, "It's a class action involving," in one sentence, he doesn't have to go on and on and on forever, and I think that's what I think is prejudicial.

THE COURT: I think we're starting to repeat ourselves, but I'm going to make it real clear. If you're going to put on an insurance commissioner, or someone who's a former insurance commissioner who comes in here at, being paid as an expert witness, and calls around his associates around the country and then says, "Boy, if there were any serious claims problems with this company, I'd know about them," and with that, with the appearance of some regulatory authority, and with that kind of strong testimony, it seems to me that he, that that sort of, putting on that kind of testimony invites an examination of how much he really knows, because I think there is certainly good reason to believe that insurance regulators, insurance commissioners, insurance department employees don't spend a lot of their resources investigating claims practices. I think that's what, that's a major issue.

And I think that if you're going to try to [253] put them on as if they know all this, then they're going to have to be subject to examination that maybe they don't know as much as they purport to know. I think it's a very, it's a very hotly contested issue in this matter, and I think you've presented it to this jury as a way of overcoming the arguments that are being made by the plaintiffs.

And I don't fault you for doing it, I think it's certainly one way of presenting your case, and you have that right to do it. But you've also got to recognize that when you're making claims, as these insurance regulators are making, before a jury that doesn't understand the regulatory process and is hearing someone who says, "Boy if there's a problem we'd know about it," then they're going to have to be asked questions to test that.

And if the way to get to it are major class actions, punitive damage actions, excess liability actions, bad faith actions in their very state that they have no knowledge about, I think it's just something that's fair examination. And I don't think that the facts of those cases should be trotted out in some way by the facts themselves to create a problem, and that was the issue that we were addressing. But as far as whether those cases are legitimate inquiry, I believe [254] they are, I've ruled on that, I think I've been clear on that.

MR. HANNI: I think you have, Your Honor, and I just want to respond, if I may, to what the court's said.

We are putting these regulators on, only on the issue because the plaintiff claims there's a national policy and pattern and practice to cheat insureds and claimants. That doesn't mean that isolated things don't happen. And we put them on only to show that there is no national policy or pattern and practice, and that if there were such a thing, they would know about it.

And whether they know about it, twenty-five cases or thirty, or a hundred out of millions and millions, thousands and thousands of cases that are in the judiciary, whether they do or don't, I say, is irrelevant to that issue. Now, the court disagrees and that's fine, but that is our view of it. It's totally irrelevant.

THE COURT: In your view of what a pattern and practice is and how to show it is also something that is very much in dispute. To attack it statistically, we've spent a lot of time on that. And maybe the jury will accept that. I don't know. But [255] there's certainly another way of addressing it.

We're only talking about bad faith cases. We're not talking about general claims. You may well have a winning argument on that issue as to how you define pattern and practice. But as I have been hearing the evidence, I don't think that it's conceded by the plaintiffs that the way to attack that question is by looking at some statistical analysis that starts with the number of policy holders or the number of claims that are filed. Most of which have nothing even remotely related to an excess damage aspect to it. And so I think the record's made.

Do the plaintiffs want to say anything more before we quit?

MR. HUMPHERYS: No, we don't.

MR. CHRISTENSEN: One more thing. It sounds like this is about as complete a record as we're going to make it, other, I guess, than the one we made back before the court ruled in May. That is these witnesses were designated towards the end of the pretrial period. In fact, Mr. Reynolds, who testified today, was designated late. I don't know if you recall, but we had a hearing on that on the telephone.

THE COURT: Over the phone, I remember you were upset about the extra regulators.

[256] MR. CHRISTENSEN: And so I don't think this has been a factor in the court's rulings, but certainly we ought to be entitled some latitude in dealing with this kind of evidence late in the day, and this is the best we've been able to come up with.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF LYLE HILLYARD, JUNE 12, 1996

[Vol. 6, R. 10261, commencing at p. 135]

* * *

LYLE HILLYARD called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.
A My name is Lyle Hillyard.
Q And what is your occupation?
A I'm a lawyer.
Q Where do you practice law?
A In Logan, Utah.
Q Do you have a family in Cache valley?
A I do, I was raised in Cache valley, my wife was raised in Cache valley, and we've lived there since I graduated from law school, and practicing in the Cache valley community.
[136] Q And approximately when was that?
A I graduated from law school in 1967, so it's been almost thirty years.
Q Are you also a member of the state legislature?
A I am.
Q What is your position?
A I'm currently serving as the assistant majority whip of the Utah State senate.
Q How long have you been in the legislature?
A I was first elected in 1980, so I've spent sixteen years in the Utah legislature.

* * *

[137] * * *

Q Do you have extensive experience trying cases in Logan to juries selected from Cache valley?
A I have. My partner and I graduated from law school together in 1967, we went back to Logan and set up our own practice. At the time we were the only two lawyers not affiliated with the prosecution, and they didn't have public defenders, so we ended up doing a number of the criminal cases to start out with, but that involved quite a few jury trials, and we've continued that. That's really kind of my speciality, is involving trial work and in jury cases, where necessary.

* * *

[143] * * *

Q Okay. You testified as an expert witness in this trial of this case last October. Is that correct?
A That's correct.
Q Did we provide you with a number of materials to review?
A More than I wanted. There were reams of material that I had to read and go through.
Q Was it feasible for you to really commit to memory all of the documents and materials that you were given?
A No. In fact, I hoped I wouldn't have to testify again, so I've tried in the last few days to go back through some of that material to refresh my memory. But I did go through, but I certainly can't tell you on page 43 this witness said this or that. But I did at the time spend the time going through and reading the liability and the damage issues, so I was familiar with those.
Q Now, you're familiar with the Sardine Canyon [144] highway where this accident occurred?
A Very familiar.

Q Has it changed in the last few years?

A Yes, they just finished a new four-lane highway that's now open going through there, and may I say, they'd been planning it for many years. It's a great addition to our valley to be able to get in and out of that canyon.

Q Back in the 1980s, was that generally known in Cache valley as a dangerous area?

A Absolutely.

Q Would you expect, based on your experience and knowledge in Cache valley, that a Cache valley jury would be very sympathetic to someone who was accused of causing an accident by making a pass in that canyon?

MR. BELNAP: Your Honor, I think that question is overly broad and without foundation, I'd object.

THE COURT: Lay some foundation. Sustained.

Q (BY MR. CHRISTENSEN) Did you have involvement, and have you had through the years, in getting public input as it relates to the concern over the hazard of the highway going through Sardine Canyon?

A I certainly have. Not only as I was president of the chambers of commerce in 1977 before I [145] ran for the legislature, and I've stood election since 1980, and I think been involved pretty heavily in public perceived issues in our valley, so I think I'm quite familiar with the public concern about Sardine Canyon, and the relief at finally having it broadened.

Q Was the danger of that canyon generally well known enough that you would expect at least some people that would serve on a jury would be aware of it?

A I think that's something that you'd be very aware of in trying a case involving Sardine Canyon, actually.

Q If you had been legal counsel for Mr. Campbell back in 1983 trying that case, would you have had some concern over how a Cache valley jury may view someone making a pass in Sardine Canyon?

MR. BELNAP: Your Honor, his concern is irrelevant. If he's testifying as an expert, or from the basis of a reasonable attorney, that's one thing. But this is irrelevant, and I object on relevancy.

MR. CHRISTENSEN: All right, I'll reword the question.

Q (BY MR. CHRISTENSEN) Should an attorney have been concerned about that, in assessing the risk to Mr. Campbell, if this case was allowed to go to a jury in Cache valley in 1983?

[146] A I would dare say that if you had anyone who's lived in Cache valley very long, that in their immediate family have either had a near death, or a near serious accident in Sardine Canyon over the years. It's just the nature of that narrow canyon. And people who get bogged down with going slow traffic to try to pass, and the storms that can occur in that canyon, I think there's a deep concern of people in Cache valley about the safety of that canyon drive.

Q Are you aware of the verdicts that the Logan jury rendered in 1983?

A I am. I heard about it after the case was over.

Q Is it your understanding that $50,000 plus burial expenses were awarded for the Ospital death?

A That's my understanding.

Q And $200,000 for the Slusher injury?

A That's my understanding.

Q Are you aware that the jury found Mr. Campbell 100 percent at fault, and Todd Ospital zero percent at fault?

A That's my understanding.

Q Based on your knowledge of this case, does that finding, that is putting all the fault on Mr. Campbell, surprise you?

[147] A No.

Q Are you saying that there's no way that a jury could have found Mr. Ospital to have at least some of the fault?

A I think, in looking at the case before it's tried, you'd expect the jury could very well find some negligence on Ospital. The key issue, as I read those depositions, and trial transcript, was how fast he was going up over that hill.

There's different versions of people who saw and testified to that, but I think the reconstruction testimony, I was more persuaded by Newell Knight and Dr. Watkins' testimony on the speed that he was not going the high rate of speed that I think Mr. Campbell thought he was going when he saw him.

But that's an issue that, going in, you don't know exactly who the jury's going to believe. And so I think if I were looking at the case for settlement value, I would have maybe put some percent on Ospital. But I'm not surprised that the jury found 100 percent on Campbell.

Q Were the verdicts higher than you would have expected from a Logan jury back in 1983?

A No. In fact, I would have projected higher verdicts based on those records.

[148] Q Was the Slusher verdict -- Strike that. Let me ask this. From your knowledge of the case, was the manner in which the lost income claims of Mr. Slusher were presented, was that a factor in the verdict being as low as it was?

A I was surprised in reading the transcript to see there was not an economist brought in to show the economic loss that Mr. Slusher would have suffered with that high amount of physical disability in light of his youth, as I recall he was 25 or 26 years of age, and had basically a blue collar type of employment.

And I think a person, as I read the medical record, with a 50 percent total disability, I would have thought that an economist could have been brought in to the jury, or into the trial to indicate to the jury the significance of the economic loss that a man in that age with that background would have with that kind of a physical disability.

* * *

[149] * * *

Q Okay. Was the Ospital verdict high, in your opinion, for a 1983 Cache valley jury?

A No. I would have projected that to be higher than it was. It was low, in my opinion, for the factors that I was able to read in the record about this young man's life and the circumstances of his relationship to his family, his age, those other factors.

* * *

[151] * * *

Q Did Mr. Campbell have anything to gain, in your opinion, by having this case go to trial?

A Absolutely not, with the small amount of insurance coverage, it could be settled for that, and have this ordeal over with, in my view he had nothing to gain at all with going to trial.

Q Are you aware that Mr. Campbell contended that he was not at fault?

A I've read that in the depositions.

Q Is that unusual, from your experience as a lawyer?

A No. A lot of times when things like this, tragedies like this happen, as you reflect back in your mind you remember the things you want to remember. So oftentimes I've found, you listen to your client very carefully, and then you go out and look at the physical facts of the case and see if that helps shed a light on it. Especially when there's a death.

It's hard to admit that I may have done something that caused the life of another person. And so that attitude that I was not at fault, I can understand that, fairly common.

Q What's the obligation of the lawyer if the [152] client has that obligation, or has that attitude, but the facts suggest the client's at risk and the case should be settled?

A I think your duty as an attorney, for your client, is to be able to explain exactly what the circumstances are in a way that they understand their risk that's being involved, and to do everything that you can within those realms of getting the case settled and getting it resolved for them.

If they still choose to go through the trial, then you make sure they clearly understand the risks that they're involved in, so that, my writing, those kinds of things, so that they fully understand that risk. And I can't think of one that I've had where I haven't been able, after visiting with my clients, being able to convince them that settling is in their best position.

Q Would you expect that a lawyer who was truly looking out for Campbell's best interest, to have demanded that State Farm settle this case?

A Absolutely.

Q Is there any way that it was in Mr. Campbell's best interest for the settlement opportunities to have been refused and the case tried?

A In my mind, I can't think of a reason that [153] you'd want to sit through a trial and have parents talk about their nineteen-year-old son who got killed, and about the other young man who got seriously injured in that car accident, when that case can be settled within your policy limits. That's what you bought insurance for. I can't think of any reason you'd want to go through trial.

* * *

CROSS EXAMINATION BY MR. BELNAP:

* * *

Q It's a true statement, is it not, Mr. Hillyard, that Mrs. Campbell never actually said to you, "I want this case settled?"

A That's true. She never said that.

Q And she never said to you that her husband wanted the case settled; is that true?

A I'm sure that's true, because we never talked about it like that.

Q Okay. Now, you mentioned that Mr. Slusher had a disability, and that's a rating that sometimes doctors give; isn't it, Mr. Hillyard?

A That's correct.

Q It is true, is it not, that Dr. Terry [154] indicated that there was a 50 percent rating, but that was not a permanent rating that he had given; isn't that true?

A That's true.

Q In other words, he indicated that he would have to evaluate the extent to which Mr. Slusher improved and healed and got better to give a final rating; isn't that true?

A That's what he said in his report. There's no other report other than his report, so I assume that was the final one.

* * *

[158] * * *

Q Would you agree, Mr. Hillyard, that there was a significant amount of time between when sight distance was available to Mr. Ospital, that he could or should have seen the presence of another vehicle, if you believed the other van drivers as to how long Mr. Campbell was out there?

A And I don't know. My answer is I don't know. I'd have to rely on a Newell Knight or a Bob Dahle to tell me.

Q So if those people said that at a minimum, if you take into account the substantial time it would take -- And I believe the testimony is that it would take approximately 10 seconds to pass the camper that Mr. Campbell was passing; do you recall that?

A I don't remember the ten seconds.

Q Would you dispute that that was the --

A If you tell me that's what the record says, I'll believe you.

Q Okay.

A Okay.

Q I believe the record was that approximately ten seconds it would take to pull out from behind the camper, pass it, and get back in. But if you believe the van drivers, you're going to have to add whatever [159] increment of time it takes to pass six vehicles, wouldn't you, Mr. Hillyard?

A That's correct, if you pass six of them.

Q Okay. And during whatever time this is, if you believe the van drivers, Mr. Campbell would be out there to be seen while a vehicle heading to the south is moving toward that potential hazard, correct?

A If that occurred clear to the under line -- Assuming what you say is correct, and the jury believes the testimony.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF BRENT HOGGAN, JUNE 12, 1996

[Vol. 6, R. 10261, commencing at p. 164]

BRENT HOGGAN called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.

A Brent Hoggan.

Q And where do you live, Mr. Hoggan?

A I live in north Logan, Utah.

Q And what is your occupation?

A Well, I'm a banker and an attorney.

Q By banker, what do you mean by that?

A I'm the executive vice president of Utah Federal Savings Bank.

Q Have you practiced law in Cache valley for a number of years?

A Yes.

Q Mr. Hoggan, this case deals with some large verdicts that were entered against Mr. Campbell by a jury in Logan on September 20th of 1983. Two days after that date, September 22nd, 1983, did Mr. Campbell come to see you, to seek your advice with respect to those verdicts?

A Yes, he did.

[165] Q That was in your office there in Logan?

A Yes.

Q Did you then meet with Mr. Campbell to discuss that issue?

A Yes.

* * *

Q Let me ask it this way. Had he come to see you to seek your advice with respect to the excess verdicts?

A Yes.

Q And you, then, met in that regard. Would you describe Mr. Campbell's emotional state at that meeting.

A It was very fragile. He was obviously [166] greatly distressed, and I felt concerned that he may even have a stroke or a heart attack, I was that concerned about his condition as I observed it.

Q As you met with clients through the years, do you recall seeing one that was as upset as Mr. Campbell was that day?

A That covers a lot of ground. I'm not sure I could answer that. Certainly distressed. Comparatively, I've been practicing law for thirty-six years, so I may have seen some that were equally distressed. I doubt that any were more stressed than he was.

Q Did Mr. Campbell express concern to you about losing his home and his personal assets?

A Yes, that was the principal concern that he had come to talk to my partner and I about.

Q In that meeting, did you write down a list, at least a preliminary list of what assets he had?

A I believe I penciled one in on a yellow sheet as we visited, yes.

Q I'm going to show you what's been marked as Exhibit 103, and ask you if that's a somewhat poor photocopy of the notes that you made of a preliminary list of Mr. Campbell's assets?

A It is.

[167] * * *

Q Would you read that for us, please?

A "Home in Lewiston, $60,000, contract on Richmond, $50,000, life insurance C.," standing in my abbreviation, for cash value, "$7,000, savings, $4,000."

* * *

[168] * * *

Q And let me make sure we've got this straight.

You were sitting there in a meeting two days after these verdicts, talking about what property Mr. Campbell had.

A That's correct.

Q The actual judgments totalled about $185,000, I think the exact figure was $184,943. So rounded off would be $185,000. And these assets would total less than that amount, would they not?

A That's correct.

Q Did you discuss with Mr. Campbell what this may mean?

A Yes.

Q Did you tell him he didn't have anything to worry about?

A No, he had a lot to worry about.

Q Did he express to you whether he was in a position in his life where he could start over? That is start over acquiring assets, if he lost what he had?

A Well, I don't know that that was the focus of our meeting. He was past sixty years old at this point in time, and had had serious health problems prior to [169] this.

* * *

[171] * * *

CROSS EXAMINATION BY MR. SCHULTZ:

* * *

[173] * * *

Q Now, Mr. Hoggan, was it your impression that the main reason Mr. Campbell was concerned when he first came to see you was because he had gone through a trial where a jury had found that he was 100 percent at fault for an accident that resulted in the death of one person, and injuries to another person?

A I think his concern was twofold. That was certainly one of his concerns, but his other concern was that he had a judgment

for more than his insurance coverage, and he feared greatly for the loss of all or a significant part of his property to pay the judgment.

[175] * * *

Q Now, based on your understanding of this matter, Mr. Hoggan, did the Ospitals or Mr. Slusher or the lawyers representing them ever obtain a writ of execution to take property from Mr. Campbell?

A Not to my knowledge.

Q And so if they didn't ever obtain a writ of execution, then they never got notice of a sheriff's sale, either; is that right?

A That would be correct.

Q And no sheriff's sale was ever held, either. correct?

A Not to my knowledge.

Q Did you ever tell Mr. Campbell to go sell any of his property and pay this judgment?

A No.

* * *

[176] * * *

Q Now, you mentioned the letter of September 29th, 1983. Let me just show you, this has now been marked as Defendant's Exhibit 104-D, Mr. Hoggan.

A Okay.

MR. BELNAP: Your Honor, we'd move to admit that into evidence.

MR. CHRISTENSEN: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 104 was received into evidence.)

Q (BY MR. SCHULTZ) Mr. Hoggan, you said that Mr. Jensen drafted this letter, for the most part?

[177] A That's correct.

Q Is that right? But it's true, is it not, Mr. Hoggan, that you reviewed the letter, and you knew the substance of what was in that letter?

A That's true.

Q And you approved it and you signed it; is that correct?

A Yes.

Q Let me just direct -- Now, this is a letter, Mr. Hoggan, that is addressed to Mr. Bennett. You knew Mr. Bennett.

A I did.

Q And did you know that Mr. Bennett had been the attorney who represented Mr. Campbell in the trial in Logan, just a week or two before?

A Yes.

Q And this letter you wrote to, or you signed, you and Mr. Jensen prepared, and that you signed, you did this in your capacity as the attorney for Mr. Campbell, correct?

A That's correct.

Q And you say that right up at the beginning, here, "We have been retained as counsel for Curtis Campbell in the above-captioned matter." Right?

A That's correct.

[178] Q And so you were speaking on his behalf in this letter, would that be correct?

A That's correct.

Q Let me go down to the fourth paragraph, Mr. Hoggan, of this letter. It says -- Can you see that, or do you want to refer to your copy?

A I can see that. I can see that better than I can see this.

Q All right. You're not nearsighted, I take it. It says, "This letter," starting here, "This letter is to advise State Farm Insurance Company, through you, of the foregoing, and also that our client looks to State Farm Insurance Company for payment of these judgments in full." So, in effect, what you are telling Mr. Bennett is, "I'm putting State Farm on notice by sending you this letter,

Mr. Bennett, that Mr. Campbell looks to State Farm to pay the judgments in full; is that correct?

A That's correct.

Q And then you go on to say, here, right here, you continue, "That Mr. Campbell considers it the duty of State Farm Insurance Company to take all steps which can be taken to set aside the judgment." At that time it was just a verdict, but you meant to get that, what had happened in the trial court, undone; isn't that what [179] that meant?

A That's what I mean.

Q Okay.

A Meant, excuse me.

Q "To take all steps which can be taken to set aside the judgment, to attempt to have the matter retried if there are facts and a basis upon which to do so."

So let me just make a couple of notes, here, Mr. Hoggan. You were telling State Farm, on behalf of Mr. Campbell, that you wanted State Farm to do whatever could be done to set the verdict aside; is that correct?

A That's correct.

Q So there could be a new trial for Mr. Campbell. Is that right?

A That's correct.

Q Okay. Now, if we go back to this, the next thing you say after that, "And further," do you see where I'm at, here?

A Yes.

Q "And further, that it remains the responsibility, now that Mr. Campbell's defense has been undertaken by State Farm, to pursue any avenues of appeal which may reasonably be made under the circumstances. This duty is not the duty, so far as we can see, of our client, but is the duty of State Farm [180] Insurance Company, particularly with their refusal and failure to settle a case within liability limits, when such could easily have been done."

So does that mean, Mr. Hoggan, that you were saying, if this verdict, this attempt to get the verdict undone and get a new trial for Mr. Campbell up in Logan, if State Farm tried to do that and was unsuccessful, then the next thing you expected State Farm to do, in fact, told them that it was their duty to do, was to appeal the judgments. Is that correct?

A That's correct.

Q Now, let me just ask you a question for clarification. Just assume, hypothetically, that the verdict the judge in Logan had, in fact, agreed with State Farm and Mr. Campbell, and had set that verdict aside and ordered a new trial. As I read your letter, that is what Mr. Campbell wanted to happen; is that correct?

A That's one of the things he wanted.

* * *

[182] * * *

Q Okay. Now, let me go back to your letter one more time, here. Go down to the second-to-the-last paragraph on page 2.

A Okay.

Q You say there, "Based on the facts that have [183] been explained to us," and by "us," you meant yourself and Mr. Jensen?

A That's correct.

Q "State Farm should have known from the outset that there was a substantial risk of an adverse decision and risk of loss under the circumstances. We submit that State Farm did not exercise good faith, and did not take due care so far as their policy holders' interests are concerned. If, for any reason, State Farm fails to follow through on the matter to its conclusion," and that would be to follow through with the trying to get the case set aside, and then filing an appeal, correct?

A That's correct. And paying the judgment.

Q Yeah, right, I'm going to get to that. "And if an ultimate decision is adverse, to pay the same in full, we would look to State Farm Insurance Company, not only for payment in full of the judgment, but for substantial punitive damages."

Okay, so now, tell me if I'm understanding this correctly, Mr. Hoggan. The third thing that you put State Farm on notice of in this letter was that, if they didn't follow this through all the way, the attempt to set the verdict aside, number one, and get a new trial, if that failed, then to file an appeal, number 2, and if that failed, then to pay the judgments in full.

[184] In other words that was the third thing that you were demanding happen if the first two didn't work out in Mr. Campbell's favor, correct?

A That's correct.

Q Okay. And your letter says, if State Farm doesn't do these three things, then you're telling Mr. Bennett that Mr. Campbell -- I'm just going to put "Mr. C," okay -- will sue State Farm -- I'll just call that "S-F" -- will sue State Farm for payment of the judgments, and what else? Can you read that? What else did you say you were going to sue State Farm for if they didn't do these three things? You were going to sue them for payment of the judgments and --

A But you've already got payment of the judgments, that's there twice.

Q What else?

A Well, the letter speaks for itself.

Q Could you just tell the jury what it is, though?

A Yes, but I'd use my words, not yours. I'd strike the word "sue." It doesn't say that. It says, "We'd look to State Farm company, not only for payment in full of the judgment, but for substantial punitive damages."

Q Isn't it implied, there, Mr. Hoggan, that [185] some kind of a legal action would be taken to get payment of the judgments and substantial punitive damages if State Farm didn't do numbers 1, 2, and 3?

A That would depend on what kind of negotiation you ended up with. And if State Farm would negotiate to resolve those issues, there would be no lawsuit.

Q Okay. But in any event, your letter said, if State Farm doesn't do 1, 2, and 3, then this is what will happen. You'll look to. I'll say it the way you wanted to. "Mr. Campbell will look to State Farm for payment of the judgments plus substantial punitive damages." That's what you were telling State Farm Mr. Campbell would do if State Farm did not do 1, 2, and 3; is that right?

A Well, maybe it's a distinction without substance. What the letter says, and it speaks for itself, and you haven't characterized it there exactly the way it is in the letter. What the letter says is, try and get the judgment set aside, the verdict. If you're not successful, appeal it. If you're not successful, pay the judgment. If you do that, that's the end of the case.

Q Okay.

A According to that letter.

Q Okay. Now, let me ask you this. Did State [186] Farm try to get the verdict set aside and get a new trial for Mr. Campbell?

A I believe they did, yes.

Q Okay. So that one got done; is that right? Did State Farm appeal the judgments?

A Yes.

Q And the appeal was not successful for Mr. Campbell, correct?

A That's correct.

Q Okay. And after that had been done, did State Farm pay the judgments in full, Mr. Hoggan?

A I'm informed that they did that, yes.

Q So State Farm did all three things that you asked them to do; is that correct?

A Eventually they apparently did that, yes.

Q Okay. And they did it in the order that you told them to do, also, correct?

A Yes, there's no other order you could do it in.

Q That's right. Did that end the matter?

A No.

Q Okay. So State Farm did all three things that you demanded they do on behalf of Mr. Campbell, but Mr. Campbell still looked to State Farm for substantial punitive damages; isn't that true?

[187] A That's correct.

Q Did you ever retract the things that you said in this letter to Mr. Bennett, tell him that you didn't want State Farm to do these three things?

A No.

* * *

Q Is there anything on that list, Mr. Hoggan, that indicates you came to the conclusion that one of Mr. Campbell's assets was a potential cause of action for bad faith against State Farm?

A No.

* * *

[188] * * *

Q Okay. Mr. Hoggan, who did you understand the judgments were entered against in the Logan case?

A Mr. Campbell.

Q Were any judgments entered against Mrs. Campbell in that case?

A I don't believe so.

Q If someone was going to execute, or take property to satisfy judgments against Curtis Campbell, would they be able to execute on property of Mrs. Campbell?

A Well, that isn't a question that's easy to answer. You would have to prove contribution. In other words, let's say that two people owned money in a joint account. And the husband put all the money

in there, but the wife's name was on there too. If you can prove that the husband put the money in the account, then you can execute on all of it, not just on the husband's half. So whatever the wife's interest was, and you could prove that it was her interest, would not be subject to excuse on judgment.

Q Okay. Would evidence that Mr. and Mrs. Campbell owned real property as joint tenants be [189] sufficient to show that she had an ownership interest in the property?

A That's not my understanding of the law.

Q So she wouldn't have an ownership interest in the property?

A She would have a record ownership interest, yes.

Q Right.

A But your question is, what can they execute on?

Q Let me go a step further, then. Is it your testimony that a judgment creditor could extinguish Mrs. Campbell's joint ownership interest in real property if there was no judgment against Mrs. Campbell?

A If the judgment -- This is my understanding of the law. If the judgment creditor could prove that Mrs. Campbell had made no contribution to the purchase price for whatever that asset was, then yes, they could extinguish her interest.

Q Okay, well what if she had brought certain property into and contributed --

A You could not execute on that.

Q And so if she had contributed to the property, no judgment creditor could sell her rights out from under her, simply because her husband had a [190] judgment against him, correct?

A That's correct.

Q And so if somebody tried to sell Mr. Campbell's joint ownership interest in property to satisfy that judgment, anybody who bought that would buy that and become a joint owner with Mr. Campbell, isn't that true?

A That's true, and concomitant to that is also true. Mrs. Campbell would then be an owner of one half of somebody that bought it on the judgment.

Q Right. How likely do you think it is, Mr. Hoggan, you having been a real estate lawyer and a banker, that you're going to find somebody who's going to step in and buy a one-half interest of a husband so that they can then become a joint owner with his wife in some property?

A There are some people with whom that would be a very inviting thing to do. And the people that buy judgments are looking for that kind of an opportunity.

Q But there are a lot of people that wouldn't be interested in that at all.

A There are a lot that wouldn't, but there are enough that are that you -- It would be exposed for sure.

A But at least Mrs. Campbell wouldn't lose her [191] interest in the property, right?

* * *

Q (BY MR. SCHULTZ) Mr. Hoggan, this is a letter dated December 6, 1983, from you to Wendell Bennett; is that correct?

A That's correct.

Q Okay. And in this letter, in the first paragraph, you say that you're making a formal demand that while State Farm pursues the appeal process, that State Farm post a supersedeas bond. Do you see that?

[192] A Yes.

Q Okay. And you know what a supersedeas bond is for?

A I do.

Q Okay. Let me ask you this. Would a supersedeas bond be necessary if the judgment creditors had made it clear they didn't intend to execute on the Campbells' property?

A What do you mean by "make it clear"?

Q Well, if, let's say, there was an understanding that no execution would be attempted on Mr. Campbell's property to satisfy the judgments, would you need a supersedeas bond?

A You would until you had the assurance in writing.

Q Okay. If you had an assurance in writing that they weren't going to execute, then a supersedeas bond wouldn't be necessary?

A That's correct.

Q And that's something that happens quite often, isn't it, when cases are on appeal, the parties just agree that no supersedeas bond will be required?

A Well, no. I wouldn't say that happens often. The ideal thing an attorney likes is a supersedeas bond so he can be sure his judgment will be satisfied if it's [193] affirmed on appeal.

Q Okay. Have you ever had it happen to you where a case has gone up on appeal and the parties have agreed no supersedeas bond is necessary?

A Ever?

Q Yeah, in your thirty-six years?

A I've had supersedeas bonds. Where I haven't had supersedeas bonds have generally been cases that didn't involve money judgments.

Q Okay. Well, let me ask you another question, here, Mr. Hoggan. You see the second paragraph of the December 6th, 1983 letter?

A Yes.

Q There is a statement here, it says, "If execution on assets occurred, we would then be forced to make demand for substantial punitive damages." When you said, "we," did you mean Mr. Campbell?

A Yes.

Q You, on behalf of Mr. Campbell, would make that demand?

A Right.

Q Okay. Now, we've already confirmed that no execution on assets ever did occur; is that right?

A To my knowledge it never did.

Q Okay. So then if Mr. Bennett and State Farm [194] were to rely on your statement, there, there shouldn't have been any demand for substantial punitive damages unless execution on assets occurred. Is that true?

A Well, that's what the letter says.

Q Okay. Well, and you were speaking the truth when you said that, weren't you?

A Yes.

Q Let me show you, then, I'm just going to show you a copy of this, Mr. Hoggan, I can't find the court exhibit right there. This is what's already been received as Defendant's Exhibit Number 98. Is that also a letter from you to Mr. Bennett?

A It is.

Q And that one is dated December 23rd, 1983?

A That's correct.

Q And in this letter, you explain to Mr. Bennett that there's been a meeting scheduled where Mr. Humpherys and Mr. Barrett will meet with you and Mr. Jensen and Mr. Campbell on January 6th of '84; is that right?

A That's correct.

Q Okay. And then you say, "I believe that we have their assurance," would that be Mr. Barrett and Mr. Humpherys' assurance?

A Yes.

[195] Q "That there will be no executions until at least that date, when they will have the opportunity to visit with Mr. Campbell," and so forth. Is that correct?

A That's what the letter says.

Q Then would you read the second paragraph into the record?

A "Under the circumstances, I believe that we could only make a final determination as to the need of the supersedeas

bond after that meeting, or as soon as we are able to obtain some type of a commitment from them as to their willingness to withhold execution pending appeal."

Q So, in effect, what you were telling Mr. Bennett at that point was, "We don't know whether or not we're going to need a supersedeas bond, and we won't know until after that meeting, or until we've figured out if we can reach some kind of an agreement." Is that true?

A That's what the letter says.

Q Let me just show you, this is a larger version of a letter, Mr. Hoggan. It's from Mr. Brady. He is Mr. Barrett's partner; is that correct? Or was, at least?

A I think he was at the time.

[196] Q And in this letter of December 23rd, 1983, Mr. Brady tells Mr. Jensen that the letter confirms a telephone conversation indicating that there won't be any commencement of any collection action pending this meeting scheduled for January; is that correct?

A The letter speaks for itself.

Q Is that what it says, in substance?

A It says, "We, nevertheless, would not commence any collection action against Mr. Campbell until we have had the opportunity to review the possible assignment of his cause of action to Ospitals."

Q Okay. And that was something that was going to be discussed at the January meeting; is that right?

A That's what that indicates.

Q And are you aware, Mr. Hoggan, that Mr. Jensen then forwarded a copy of that letter on to Mr. Campbell so he would know that that was what was happening?

A I'm not aware of that.

Q Okay. It's true, is it not, Mr. Hoggan, that Mr. Bennett wrote you at least one, and maybe more letters, where he encouraged you and Mr. Jensen to do whatever was necessary

to see that Mr. Campbell was protected from losing any of his property, and to try and reach an agreement with Slusher and Ospital.

[197] A As I recall, that's true.

Q Were you aware of, Mr. Hoggan, of the letter that came from Mr. Barrett in March of 1984, indicating that so long as the parties were still talking and trying to reach an agreement, that there would be no attempt to execute on Mr. Campbell's property?

A You've got a moving target, there, hold it still for me.

Q I'm trying to let the jury see it, as well as you.

A Okay, what was your question?

Q Well, were you aware, Mr. Hoggan, that this letter came into your office in March of 1984, in which Mr. Barrett, and he said he'd talked to Mr. Humpherys about this, as well, that so long as the parties were trying to reach an understanding, there wouldn't be any attempt to take Mr. Campbell's property. Were you aware of that letter?

A I was not aware of it at the time.

Q Okay. Have you seen it since then?

A I have reviewed the file, and I would have seen it, probably at or about the time my deposition was taken.

Q Okay. Mr. Hoggan, did Mr. Barrett or Mr. Humpherys, the lawyers for Slusher and the Ospitals, [198] ever tell you about any agreements they had made prior to the trial with respect to pursuing a bad faith claim?

A Prior to the trial in September of 1983?

Q Let me restate it. Were you ever told by counsel for Mr. Slusher or the Ospitals, that they had made an agreement in June of 1983, with respect to pursuing a bad faith action?

A No.

Q Was it your understanding, Mr. Hoggan, that the Ospitals and Mr. Slusher were seeking an agreement from Mr. Campbell during the time that you were involved in this matter, whereby

they would be able to obtain either an assignment of his rights against State Farm in a bad faith action, or an agreement that he would pursue such an action that would eventually be to their benefit in one way or another?

A Was I aware that they were negotiating for that?

Q Yeah.

A I was.

Q Were you aware that that's what they wanted from Mr. Campbell?

A Well, they --

Q Or that that's what they proposed?

A They wanted their judgments satisfied, as I [199] understood it. And one of the conditions to withholding their execution on that judgment was that they come to some kind of terms with Mr. Campbell concerning a possible action against State Farm.

Q And did they propose such an understanding to you and Mr. Jensen in your meeting of January 6th, 1984?

A Well, it was discussed. Who proposed it, I don't know. I don't remember that. But it was the subject of discussion in that meeting.

Q Okay. And do you recall Mr. Humpherys at that meeting telling those who were present that it was their desire to work with Mr. Campbell?

A I'm not trying to be evasive. What was said in that meeting, that's thirteen years ago, and I frankly just do not remember. That's too long, too many meetings ago.

Q Okay. If Mr. Humpherys has some notes from the meeting that say that, you wouldn't dispute that that was said, would you?

A It could have been, then.

* * *

[200] * * *

REDIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Hoggan, I've been interested to hear this line of questioning. Let me see if I can clear up some things. The judgments were paid by State Farm eventually in 1989, after the appeal?

A I don't know that. You both indicated, and if that's the case you'd have better knowledge of it than I would.

Q And the excess verdicts were in 1983, and the judgments were in 1983. You were asked about a letter you wrote a few days after these excess verdicts where there was a demand that State Farm pay the judgments and appeal and so forth. Were you looking for protection from Mr. Campbell six years later, or were you looking for protection immediately from State Farm?

A Well, we were looking for protection immediately, for two things. One for his physical assets, and two, for his emotional well-being. There was never an assurance, until the money was paid, that was going to be paid.

Q In 1986, apparently, finally there was that assurance, two and a half years later. So when you wrote the letter you were questioned about, that was on [201] the screen, did you have in mind that State Farm paying six years later would satisfy what you were asking State Farm to do?

A Well, the letter doesn't say this in so many words. My intent was, "look, you pay that judgment and you tell me today that, or soon, that you will pay it."

MR. SCHULTZ: Your Honor, I object to that. The letter speaks for itself. It's not ambiguous. I don't think he's allowed to say what his underlying intent was if it's different from what the words say themselves.

MR. CHRISTENSEN: Well, there's been a misconception created, here, I'm trying to clear up, and that is that State Farm did exactly what this man, on behalf of Mr. Campbell, wanted them to do.

THE COURT: Overruled, I'll allow it.

Q (BY MR. CHRISTENSEN) Go ahead, finish your answer.

A Well, the answer was that, "If we have your assurance that you won't execute on it, that's fine, because State Farm has the assets that I know they can pay the judgment." I don't think they ever gave that assurance, and so for Campbell's purpose, he never did know whether State Farm would do it or not until they did it, or said they would do it.

[202] Q Did you have in mind, when you asked for an appeal, that State Farm would leave Mr. Campbell hanging during the appeal, as far as his personal assets were concerned?

MR. SCHULTZ: Object, Your Honor, misstates the evidence.

THE COURT: Overruled.

THE WITNESS: Well, no.

Q (BY MR. CHRISTENSEN) Did you expect State Farm to agree to provide some protection to Mr. Campbell so he wouldn't lose his home while that appeal was pending?

A Yes.

Q Would it have done Mr. Campbell any good to have an appeal if he lost his home and his property while the appeal was pending?

A Well, I guess you could argue that if the appeal was affirmed, then you say that took six years for that to happen, I guess he could get his home back. But he would have suffered mightily in the interim. Between when he lost it and when he got it back because the appeal was affirmed. Or reversed, excuse me.

Q In fact, were there substantial discussions where you, on behalf of Mr. Campbell, told State Farm, "We need you to post a bond for the full amount to [203] protect Mr. Campbell"?

A Well, that's what Wendell Bennett and I discussed in the meeting in early December of 1983.

Q This letter you wrote that was read a little earlier, the first paragraph says, "Pursuant to our conversation on December 2nd in the above matter, I would simply reduce to writing what I indicated to you. Formal demand is hereby made that, as State Farm pursues the appeal process, State Farm also post a supersedeas bond in the matter, so as to protect Mr. Campbell's assets and position in the case."

Did you say that to Mr. Bennett orally?

A Well, maybe not in exactly those words, but to that effect. And then the letter was intended to formalize what I had said to him verbally.

Q And was that to get protection now, instead of years later?

A That's correct.

Q And did State Farm ever post a supersedeas bond that you're aware of?

A Not that I'm aware of.

Q Did State Farm say they wouldn't do it?

A I don't know that.

Q How did Mr. Campbell keep from losing his assets while the appeal was pending? Was it from [204] anything State Farm did?

A Not to my knowledge.

Q Was it because Mr. Jensen, your partner, worked out an agreement with Slusher and Ospital?

A I believe that that was the reason why there was no execution on the judgment.

Q It wasn't anything State Farm did?

A Not to my knowledge.

Q As far as you were aware, was State Farm willing to let Mr. Campbell lose his home while they appealed the case?

MR. SCHULTZ: Object, Your Honor, calls for speculation.

Q (BY MR. CHRISTENSEN) From what you were told?

THE COURT: Overruled.

THE WITNESS: There's nothing that I was told, or that I was aware of, that State Farm did to avoid that happening.

Q (BY MR. CHRISTENSEN) Now, you were asked about joint property, if a husband and wife owned something jointly and the judgment's just against the husband, is the wife's property, can it not be taken? And you discussed that. Let me get back to that.

If you own a home, for example, and the [205] husband and wife own it, and a judgment creditor takes the husband's half of the home, does the law have a way of dealing with it so that the judgment creditor and the wife don't literally have to live together?

A Yes.

Q And what is that?

A It's what's called a partition action, meaning that the court can order the asset to be sold and money divided in whatever proportion the ownership of the property is held.

Q So we wouldn't have had Mr. Slusher living with Mrs. Campbell?

A Assuming that Mr. Slusher was the successful bidder at the sheriff's sale, no.

Q Would the court have ordered the Campbell home sold and given Mrs. Campbell part of the money, assuming she could show it was her part, and the rest of the money would have gone to the judgment creditor?

A If there had been an execution?

Q Yes.

A That's correct.

Q Now, you said there are people that look for opportunities like this to buy at sheriff's sales. Is that because they can get assets for less than they're worth?

[206] A Yes.

Q Sometimes can they get them for a lot less than they're worth?

A Yes.

Q So if Mr. Campbell, Mr. and Mrs. Campbell's property went to sheriff's sale, was it likely they'd have gotten less than the figures we had up on the board?

A Well, if they owned that home together they wouldn't get half. Whoever bid on that at sheriff's sale would bid a lot less than half, in my experience.

Q Trying to make a good deal?

A Yeah.

Q And then would they ask the court to order the home sold and take their half of the money?

A Yes.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF FELIX E. JENSEN, JUNE 25 & 26, 1996

[Vol. 13, R. 10268, commencing at p. 195]

* * *

FELIX E. JENSEN called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HUMPHERYS:

* * *

Q Would you state your full name, please.

A My name is Felix Edward Jensen.

Q Are you currently employed?

A I am.

Q For whom?

A State Farm.

Q For how long have you been employed at State Farm?

[196] A I've been employed for about thirty-three years.

* * *

Q And during the time period you've been working for State Farm the last thirty-three years, have you been primarily involved in the settling of claims?

A Yes.

Q You haven't worked your way into management very much, have you?

A No. Just for about a thirteen-month period of time in 1972, when I was an office manager of a small claims office in Murray, Utah.

Q During this, the thirty-three-year period, have you worked both on fire claims and auto claims?

A Yes.

Q Mostly auto claims, however; is that correct?

A In the beginning of my career, 25 percent of my inventory would be fire claims, liability and fire [197] claims.

Q And then after about how long has it been primarily auto?

A After the middle eighties, the fire and auto company sort of parted ways, and we, as automobile liability adjusters, handled fire claims only rarely.

Q All right. Now, from time to time in your training at State Farm, would you attend what are called claim conferences?

A Yes.

Q And just briefly describe to the jury what those are.

A They would be about meetings of two or three days where all the claims folks would get together, and various aspects of claims work would be discussed by management. Playing golf and going out for dinner and generally having a good time.

Q And hopefully get some training in between the golf games?

A Ah, not much training, no. More of a get together.

Q Do you recall a few years, or many years ago, that at a particular claims training meeting, that Ray Summers spoke?

A I think the meeting you're referring to [198] occurred, if I remember correctly -- and it's been a long time ago -- about 1979.

Q But he was a speaker at that meeting?

A He was one of the speakers, uh-huh.

Q Right. Now, he has testified, here, last Friday, that he was asked to speak and address the issue of settling claims and using phony or dummy memos, or false memos, if you will, in order to assist in the claims process. Do you recall being at that meeting when he talked about that?

A I was at the meeting, yes.

Q And did he actually talk about using false memos in order to assist him in settling claims?

A I couldn't testify to that. My recollection is not that sharp. I did give a deposition about this matter, I believe in 1982, where Mr. Hanni was my attorney, and he would have a copy of that deposition.

It's been so long ago that I have a tough time. I have a tough time remembering what I did last week, not at least in 1979.

I do remember the meeting you're talking about. I remember Mr. Summers being one of the speakers. The meeting was at Canyon Racquet Club next to my office. Doug Hardy was at the meeting. The meeting was for the purpose of the claims adjusters to [199] get together and discuss claims practices. Mr. Summers did, in fact, say something about he would write memos to himself about giving himself authority on certain files.

Q And that that memo was not representative of a true memo from the supervisor? Or the superintendent?

A I couldn't testify to that, I don't know what he meant. I don't remember what he meant by that. He did say that he wrote memos to himself about authority on a given file.

Q And then he would try and use that memo to present it to a claimant to say, "That's all the authority I have"?

A My recollection serves me well, that is what he said.

Q All right.

A But he, it was not only him that said that, there were several other people at the meeting that said they used the same method.

Q Several other adjusters that said they used the same thing?

A Several other adjusters, yes.

Q Do you remember in your deposition in 1994 talking about that meeting?

A I remember that.

[200] Q And there was reference to the fact that these were dummy memos. Do you remember that?

A If you mean dummy memos, if you mean that Mr. Summers wrote memos to himself? Is that what you mean?

Q Yes. I'm just trying to understand. That's what it meant to you, is he would write a memo to himself regarding authority, and then he would present that as saying, "This is all the authority I have"?

A I'm not sure whether he wrote a memo to himself, from himself, or whether he wrote a memo from his alleged superintendent to himself saying, "I have X-amount of money authority." I don't recall that.

Q All right. Now, Mr. Summers testified here a few days ago that that was one technique he used in order to try and get someone to settle for a lower amount, would be to type up a memo from his superintendent to himself, that wasn't from the superintendent, and it would say, "You only have $35,000 of authority," and then he would take it to the claimant and say, "I'm sorry, this is all the authority I can get." Now, does that sound about like the way he presented that in that meeting?

A It sounds correct as far as I recollect. Now, again, this meeting was in 1979.

[201] Q I understand. Now, there was interchange in this meeting, wasn't there?

A Yes, it was a workshop.

Q And adjusters, other adjusters would comment about what they would try and do to settle claims?

A Yes. The reason for the meeting was that State Farm had a disastrous claim year in 1979. I think they lost something like $93 million in underwriting loss, and so the purpose of the meeting was simply to have the adjusters in the whole state get together and discuss ways of improving

claims handling. One of the ways Mr. Summers proposed, but there were many other propositions.

Q All right. But in response, did other adjusters say they did the same thing?

A That's correct, they did.

Q And you didn't see anything improper about that, did you?

A Yes, I did.

Q Did you? Do you recall testifying that you thought it was not improper for him to --

A It depends on what you mean by improper.

Q I'm trying to use your language. Would you like to look at your testimony?

A I have it here.

[202] Q Okay. Why don't you turn, if you would, to page 251.

A 251?

Q Uh-huh. Do you have that page there?

A One second, there.

Q While you're looking at that --

A Okay, I have it.

Q Your deposition was taken February 15, 1994.

A Right.

Q And you were present, I was present, Mr. Burton from Strong and Hanni was present, and Mr. Lowell Smith, another State Farm lawyer?

A He was my attorney, Mr. Smith.

Q And he's also one regularly retained by State Farm.

A Oh, yes.

Q All right. And would you read your answer, starting on line 1.

A Line 1. "Oh, I didn't think anything that was said there was not proper. You misunderstand me. I don't think Summers'

remarks of what he said was improper, I just don't think -- In my opinion, it was just not good claims handling. I think there is a difference."

Q All right. So you were explaining that, [203] though you don't do that as part of what you think are good claims practices, you didn't think it was improper.

A That's correct.

Q Okay.

A There was nothing improper about the meeting. Whatever you brought out in the meeting was proper. Now, whether or not I would personally use a particular thing to discuss, that would be up to, I suppose, the individual claims handler. I don't believe in writing memos to yourself from someone else.

Q Apparently others thought that it was okay, though?

A That's correct.

Q Now, if he were to write or type a memo to himself from a superintendent who didn't write the memo, in reality that would not be a true document, would it?

A I don't believe so, no.

Q It would be a false document, wouldn't it?

A I would have to agree, yes.

Q And so to the extent that he and other adjusters were typing up these memos, they would constitute a falsified document, wouldn't they?

A In my opinion, yes.

Q Now, I would like to draw your attention to the time period in the mid-eighties when Mr. Noxon [204] became a divisional claim superintendent. You recall that time period?

A Oh, yes.

* * *

* * *

MR. HUMPHREYS: Yes, this goes to the issue of punitive damage. The claim practices, it also goes to the issue of Mr. Noxon, who has testified, and we expect will testify, that he's never ordered a change in any kind of evaluation or report.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) All right, now, during this time period, Mr. Jensen, were there time periods [205] when you and your superintendent -- Was it Samantha Bird?

A Samantha Bird.

Q She was your superintendent, immediately above you?

A That's correct.

Q And then Mr. Noxon was above her; is that correct?

A He was the divisional claim superintendent in the Sandy office.

Q All right. Was there a period of time that you were aware that Mr. Noxon was refusing to give her certain authority on files?

A Yes.

Q Was that happening very often?

A Quite frequently.

Q Did that become a concern to you and other members of your unit?

A It became a great concern to my unit because we couldn't get any claims settled.

Q Did it affect you in a way that you would stop asking for authority to settle claims, or at least ask for authority, a lesser authority?

A It affected my unit in the way that we decided that what we would do is request authority on [206] any given file, if we could do that in the amount that we knew that Samantha Bird could give us.

Q Okay. Let's talk about that for just a brief moment. If I can find who took the pen. During this time period, what was your authority?

A I believe my field authority was $7,500.

Q Now, does that mean that any claim within $7,500, you had the right to settle it without seeking specific authority from your superintendent?

A That's correct.

Q All right. And what was Samantha Bird's authority?

A I believe her authority was $15,000.

Q And so if a claim was with serious injuries required authority above fifteen, would it require a request for authority of Bob Noxon?

A It would have required a request for authority to Bob Noxon.

Q Right. He would have to authorize that, right?

A That's correct.

Q So I will put $15,000, plus. Now, when this period of time, during the few years that you've been talking about, that Mr. Noxon, Robert Noxon -- I think he goes by Bob, doesn't he?

[207] A Bob.

Q You say he was refusing to give authority above fifteen to Samantha Bird, as you understood it?

A He would be very -- It would be very difficult for me as a claims adjuster to get authority over and above the $15,000. Not just me, but the whole unit.

Q The whole unit. And that would include when Samantha Bird would request for authority to settle?

A That's correct.

Q And were there times, Mr. Felix, when Mr. Noxon would request that you change your evaluation of claims?

A Yes.

Q Did that happen very often during this period of time?

A Quite often.

Q And so do we understand what was going on, if we had a serious claim that, say, had a reasonable value of $30,000, that would require you to submit a request to your superintendent, correct?

A That's correct.

Q And then she would submit the request to Bob Noxon; is that correct?

A That's correct.

[208] Q Now, that would be often in the form of a written request for authority, correct?

A Always a written request.

Q And when Mr. Noxon would tell you that your evaluation was too high, would he then ask you to change that?

A He would not tell me. He would write a note on my request for authority, return it to Samantha Bird and she would tell me.

Q All right. And would that, then, require you to rewrite the request for authority?

A No.

Q Would it --

A That I wouldn't do it.

Q Why wouldn't you rewrite one of the documents in the claim file?

A That's a ridiculous thing to do.

Q Was Mr. Noxon asking you and others in your claim unit to alter the papers in the claim file?

A No.

Q Was he asking you to rewrite the request for authority?

A He would ask Samantha Bird, or he would tell Samantha Bird that my request for authority on a particular file was too high, he wanted it changed.

[209] Q And you would then be required to alter your evaluation?

A No, I wouldn't do it.

Q You wouldn't do it?

A No.

Q You recall times when he would request that the claims reports be altered?

A No.

Q Now, I'm not asking you specifically. Do you recall when that request was made of Ms. Bird?

A I don't recall.

Q Do you recall testifying that, when I asked you whether things were changed in claim files, you said, "All of the time."

Why don't you look at page 152 of your deposition, please.

A Okay.

Q Let's see if we can refresh your memory.

A I'm getting old and getting up there.

Q We all are. Thank goodness we have things in writing.

A Okay, 152.

Q 172?

A Sorry. Okay.

Q Starting on line 6 I asked you, "In terms of [210] dealing with the claim files, were any of the internal documents, do you ever recall him modifying or changing documents to suit his purpose?" Your answer?

A "All the time." What I told you is, I told you how he would write notes on my request for authority, advising Samantha Bird to tell me to change my evaluation of a given claim.

Q And he would become furious when you would refuse, or Sam Bird would refuse?

A Absolutely.

Q He would become -- What do you mean when you say "furious"?

A Obnoxious. Verbally abusive. To her, not to me.

* * *

[212] * * *

Q Now, there was a reference in your deposition that there were requests for changes, or that you saw evaluation changes as much as over a hundred times, or at least a hundred times? Does that ring a bell?

A In regards to what?

Q Well, changes in the file. Let me have you turn, if you would, to page 174.

A Okay.

Q All right. Down at line 24?

A Line 24, okay.

Q "Did it happen more than once in your files that he wanted a change of evaluations?"

A "Yes, as I said, very frequently, quite frequently Mr. Noxon told my superintendent Samantha Bird that I, my evaluations of any particular case was too high, he wanted it changed."

Q And you indicated even as many as a hundred times?

A Probably, over the years, yeah. We had a continuous conflict about what, or how to evaluate, or what we thought an evaluation of the claim would be.

Q And you refused to do it, didn't you?

A That's right.

[213] Q You didn't think that would be honest, did you?

A No, I didn't think so.

Q Now, when Mr. Noxon would refuse to give you authority to settle a case beyond the limit of Samantha Bird, would that mean that you only had that $15,000 to settle the case, even though it may have had a value in excess of that?

A No. What Mr. Noxon would do on several, or several occasions, if I requested $30,000 authority he would give me twenty. And since God spoke, then I would take that as gospel, this is the authority I had, $20,000.

Q And then you would try and settle it for twenty?

A I would try to settle it for $20,000.

Q Now, when you would request authority for thirty, for example, would, in your best judgment over the past thirty-three years, or however long it was at that time, would that be your best estimate of what the claim would be worth?

A Yes.

Q Would you try and overestimate the value of those claims?

A No. I have no reason to.

[214] * * *

Q (BY MR. HUMPHERYS) Now, wasn't it a common knowledge among the adjusters that you don't write certain things in the file? Certain derogatory things in the file?

A Yes.

Q And isn't it true that whenever there was a conflict, like you're describing between your evaluation and Noxon's evaluation, that that would not go in the file, the conflict over that?

A No, it would go on notes.

Q And those notes would not become part of the permanent file, would they?

A That's correct.

Q They would be destroyed after?

A I don't know.

Q Are these the little yellow post-it notes?

A Little white, yellow, purple, whatever.

[215] Q Whatever. And these little post-it notes then would later on disappear from the file, or never become part of it?

A I would not know.

Q All right, you wouldn't know. Do you recall that in about 1990, Samantha Bird gave you a memo to destroy all of your old documents, your school notes, your old manuals, and the like?

A Yes.

Q And we're going to look at that memo when Ms. Bird comes in to testify, probably tomorrow. But did you receive that in the normal course of your business as an employee and claims representative at State Farm?

A Yes.

Q And did you follow that direction and destroy all of your documents?

A No.

Q Since that time, Mr. Jensen, has someone from State Farm contacted you to indicate one way or the other whether or not you should keep that memo?

A Yes.

Q Would you please relate to the jury what happened, who it was that called, about when it was, and what was said to you?

[216] A Quite recently State Farm sent a representative to all the offices to go through all of the, all your desks to see what memos you had, or books or manuals. As far as I was concerned that was perfectly all right to me. They could have anything I want at my desk was fine. And they did do that. I don't know who the person was, I wasn't around when the person came to go through my desk. As I said, that was perfectly okay with me.

Q All right. But I'm referring now to the memo from Ms. Bird to you regarding the destruction of those documents.

A Uh-huh.

Q Did anyone contact you and ask you if you had a copy of that memo?

A Not that I recall.

Q Do you recall anyone come by suggesting that that memo didn't exist?

A No.

Q Or asking you to destroy that memo?

A No. I never talked to anyone about the memo.

Q But you still have a copy of that?

A No.

Q You don't? What happened to it?

A I have no idea. I didn't pay any attention [217] to it.

Q So it was destroyed, as far as you know?

A It would have been on my desk. And where it is now, I have no idea.

Q You mean you kept it until these people came by and went through your desk?

A No, I just, I would keep it with my other documents on my desk would be just in the cubicle.

Q You don't recall destroying the document, do you?

A No.

* * *

Q (BY MR. HUMPHERYS) Mr. Jensen, this event [218] where you said some State Farm people came by and went through your desk, approximately how long ago was it?

A Not very long ago.

Q A few months ago?

A I don't know if they went through my desk, I wasn't there. I was told that a person would come to our office and go through all the old manuals, and memos, and whatever he wills, and whether that would bother me, and I said, "No, go ahead. Help yourself."

Q All right.

A I would say probably within a year, eighteen months.

Q Within a year to eighteen months ago?

A Yeah, if my memory at all serves me.

Q Do you know who it was that did that?

A I have no idea.

Q I'm going to show you what appears to be a hard copy of an E-mail, or at least a computer communication. Do you recognize that, or can you see it from where you are?

A Yes.

Q It indicates Samantha Bird. That would be the generator of the memo; is that correct?

A That's correct.

Q And the subject is "purging old files."

[219] A Right.

Q And it was addressed to these individuals, including you, here's Felix Jensen.

A Right.

Q Are these the individuals in your unit? Or that they were --

A Part of them are support personnel. Carol Young was a support person, Susan Moore was a support person, Teri Fuller a support person, Marsha Daybell worked in the protection unit, Lester Clark and Jerry Paul and myself worked in the BI unit.

Q The date of this memo is April 6th, 1990?

A Yes.

Q Is this the memo that you said you received a copy of from Samantha Bird?

A Yes, it came over the E-mail.

Q And did you keep a copy of that?

A No.

Q You did not keep a copy?

A No, I did not.

Q I'm sorry, I thought you said you did.

A I think -- Yeah, I would have kept a copy and put it in my cubicle, and then I would have forgotten about it.

Q To your knowledge, you didn't destroy this [220] memo, did you?

A No, I didn't destroy anything.

Q Have you checked to see if this memo is still available in your cubicle?

A No.

Q I just want to read very quickly this middle paragraph. Well, let's lead read the first two paragraphs.

"Yesterday in the staff meeting we talked about the need to purge our desks of all old memos, notes, and procedural guides. With the increase of bad faith suits being filed against State Farm, it is important that you get rid of all your old stuff I know you have lurking around in your drawers and filing cabinets.

"Please get rid of any old memos, claim school notes, old seminar or claim conference notes, and any old procedure guides you may have. They are trying to avoid having to come up with old records when the request for production of documents comes in, and they request all training manuals, memos, procedure guides, et cetera that are in the possession of your claims reps and management.

"Apparently they had a request like this in Texas and each person had to surrender all their old [221] junk. I guess corporate is not even going to keep old CPG guides, old claim manuals, et cetera. We will only have what is currently in effect. That way, if they subpoena our claim manual for U claims for 1987, for example, we will say we don't have it. This should be easier than trying to produce it or having to defend it."

Is that, in fact, the memo that you got from Samantha Bird?

A Yes.

* * *

[Vol. 14, R. 10269, commencing at p. 4]

* * *

FELIX E. JENSEN the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION BY MR. HUMPHERYS:

* * *

[5] Q Are you one of the senior claims representatives in Utah?

A Yes.

Q And I guess probably you're one of the oldest adjusters in Utah; would that be a fair statement?

A Yes.

Q Yesterday as we closed, we were talking about a couple of things. One I would like to make sure we have identified, and that was the false memo, or memos that Mr. Summers referred to in that claims meeting. That meeting took place approximately when? About '79, is that what you said?

A To the best of my recollection, it would have been 1979.

Q So --

A But I may be wrong. I'm getting older, and my mind's not that sharp any more.

Q I understand. So it was before this spectrum that he was addressing in a claims conference the phony, or false memos?

A I don't know anything about a claims conference and phony memos. Maybe I never attended a claims conference where phony memos were discussed.

Q With Mr. Summers, he was discussing that, wasn't he?

[6] A That was not a claims conference.

Q That was in a claims meeting?

A It was a round table discussion of how to handle claims. The discussion was called by the claims representatives themselves.

Q And all of the claims representatives in Utah were present?

A There were a few that were not there. Paul West was on vacation.

Q But generally --

A But generally it was for everyone in the state of Utah in a claims, on the firing line, claims adjuster. Not any support people, no management people of any kind.

Q All right, I understand. All right, now, I'd like to go back to the, what we call the Bird memo, that's Samantha Bird, and the memo that she generated, so we know what we're talking about. We read that last night.

Now, I asked you -- this computer's great, but I don't understand it, it works when people know how to work it -- I asked you the question last night, "Since that time, Mr. Jensen, has someone from State Farm contacted you to indicate one way or the other whether or not you should keep that memo?"

[7] Your answer was yes. And then when I asked you to explain, you talked about the fact that someone had called and made arrangements to go through your desk and so forth.

Now, isn't it true, Mr. Jensen, that a person did call you about whether you had a copy of that memo?

A Well, Your Honor, I made a mistake in my testimony, and with your permission I'd like to ratify what I said, because it was a mistake on my part. And I went over my testimony last night, I realized I'd answered the question wrong.

THE COURT: All right, just proceed to answer the questions from counsel.

Q (BY MR. HUMPHERYS) Would you please relate the circumstances of this telephone call? First of all, when was it? About a year or two ago?

A It wasn't a telephone call. I received an electronic computer from a corporate attorney in Bloomington, Illinois.

Q What was his name?

A I have no idea.

Q All right.

A I don't even know that, because my equipment is such that if I wished to reply to him, all I need to do is push a button and it'll bring up his name, his [8] title, his location for me, and it is stored for me in the computer memory.

Q All right. And were you asked in that communication whether or not you had that memo?

A I was asked two questions. The first question was, would I supply him with a copy of a memo that dealt with getting rid of old manuals, and the second question was, would I assist him in locating a support person whose name was on the memo by the name of Carol Young.

This man, of course, did not know that Carol Young, shortly after this particular time, contracted breast cancer, she left State Farm, went to the island of Oahu to live with her daughter, where she died very shortly thereafter.

Q All right.

A I related that by electronic message back to him, and I told him if I had Samantha Bird's memo in my possession I would be more than glad to send him a copy. I looked for the memo on my desk, I couldn't find it. I don't know if I threw it away, which I would assume I probably did, or if someone took the memo from my desk, which I don't believe people would do. Not the people I work with.

Q Now, was this communication after the time [9] when someone went through your desk from State Farm, as you described last night?

A This was before.

Q Before. Now, do you recall having a conversation with Ms. Bird about this incident, or this communication with someone from corporate?

A Yes. It was about a year ago that we talked about that.

Q All right. And do you recall telling her that State Farm told you that they were taking the position that this memo did not exist?

A No.

MR. BELNAP: Your Honor, this is hearsay, and I object to it on that basis.

MR. HUMPHERYS: It's not hearsay. I'm asking what he told her.

MR. BELNAP: Well, what he told her is outside the presence of this client, my client. Ms. Bird is not an employee as of within the last year, and so it is hearsay, Your Honor.

MR. HUMPHERYS: I'm not asking what Bird said to him, I'm asking what he said, and that's not hearsay.

MR. BELNAP: It's an out-of-court statement.

MR. HUMPHERYS: And in any event, it's against a party's interest, which is an exception, but [10] it's not hearsay. He's talking about what he said.

THE COURT: I'll allow him to testify what he said to her, based on that.

Q (BY MR. HUMPHERYS) Do you remember telling Ms. Bird that State Farm had told you that it was going to be their position that memo did not exist?

MR. BELNAP: Objection, leading.

MR. HUMPHERYS: And I'm entitled to lead, the court's already indicated that.

MR. BELNAP: Can I have a bench conference, Your Honor?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. HUMPHERYS) As it relates to the conversation with Ms. Bird that you had, could you relate to the jury what you told her regarding whether or not State Farm was taking the position that this memo did not exist?

MR. BELNAP: Same objection, Your Honor.

THE COURT: I'll allow that answer. You can answer that question.

THE WITNESS: I don't believe I discussed with Ms. Bird anything of that nature, because actually this is the first time I've ever heard anyone say that [11] this memo did not exist. That's a ridiculous proposition from my point of view, because if it comes to my terminal --

If you understand the process by which memos are sent, as you saw, it said "Felix Jensen, GRLY-38," that's my code number. When that is on the memo that memo comes to me. No question about it. There's no way you can do it any other way.

Q Did you know that in this case we have requested formally through the court that State Farm authenticate that memo, and they have refused to do so?

A I don't know anything about it.

Q All right. Now, do you recall telling Ms. Bird that you told a representative of State Farm who contacted you regarding this memo that, as far as you were concerned that memo did exist, and you had a copy of it? Do you remember telling her that?

A Certainly.

Q Do you remember also telling her that State Farm could take whatever position they chose to, but you had a copy of it?

A I don't particularly recall saying that in those terms, but I would have told her that, if that had been relevant. If I have a memo, I have it. If I don't have it, I don't have it.

[12] Q Do you recall someone from State Farm telling you that they wanted that document destroyed?

A No.

Q And you deny that?

A I don't recall anyone ever telling me to destroy anything.

Q Do you recall telling Ms. Bird that you had been instructed to destroy that document?

A No.

Q Have you found Ms. Bird to be an honest person, as far as you know?

A She is a very honest, very outstanding person.

Q All right. A few remaining points that I'd like to talk about. Mr. Jensen, Mr. Noxon was promoted to divisional claims superintendent sometime in about 1985; is that your memory?

A That sounds correct.

Q And previous to that time he was a superintendent, which would be the next level down, correct?

A That's correct.

Q That would be the same level of Samantha Bird?

A That's correct.

[13] Q During this period of time that you talked about last night when Mr. Noxon would refuse to give her authority to settle claims, or that he would substantially decrease what was authorized on the claim, do you remember being concerned enough to talk to John Martin about that?

A Yes.

Q Now, tell the jury who John Martin is.

A John Martin at that time would be what's referred to as the divisional claim manager over the Utah division, which would mean that he would be in charge of all of Utah claims operations, including, I believe, the fire company at that time.

Q And he, would that be part of a regional position?

A Yes, in Greeley, Colorado.

Q And that's where he resided?

A That's correct.

Q Do you recall explaining to him the problems you were having getting authority from Mr. Noxon?

A Yes, I did.

Q And was his response, "If you can't stand the heat, then get out of the kitchen"?

MR BELNAP: Excuse me, Your Honor, could I have some foundation as to when this conversation took [14] place?

MR. HUMPHERYS: I'll ask the questions regarding timing, sure.

Q (BY MR. HUMPHERYS) About when was this, Mr. Jensen?

A Again, I can give you a stab at it. I believe that conversation between him and me would take place somewhere around 1988, '89.

Q All right. And --

A I told Mr. Martin -- Mr. Noxon --

MR. BELNAP: Excuse me just a moment. Your Honor, I want to register an objection on this in terms of Rule 404, 406, and relevancy, given the time period and the time frame.

THE COURT: Would you address that to the court?

MR. HUMPHERYS: Sure. This relates to the time period for punitive damages, that the problems have continued on since 1981 and prior.

MR. BELNAP: Your Honor, if this is going to be an argument, I'd ask that we have this at bench conference on that.

THE COURT: What I'm going to do is, I'm going to overrule the objection. I understand your position at this point, and I'll let you put it on the [15] record later.

* * *

Q (BY MR. HUMPHERYS) What did he tell you?

A I told Mr. Martin that -- Mr. Noxon's one of my memorable failures in my State Farm career. I trained Mr. Noxon when he first came to Utah from Illinois, and he wanted to become a bodily injury adjuster. And I have to take the responsibility, because I did, in fact, train him into that position. And in my opinion I didn't do a very good job.

But nevertheless, he was the divisional claims superintendent, and when we had the difficulties, as we talked about yesterday, I approached his boss, John Martin, and requested a conference with Mr. Martin, for Mr. Martin to come to, I believe the Sandy office, where I worked at that particular point in time.

Mr. Martin did, in fact, come to the Sandy office, I had a conference with Mr. Martin, I told him [16] that the situation between Ms. Bird and Mr. Noxon was becoming one, an intolerable situation, not from just a personal point of view, but from a claim point of view. The unit was not functioning, in my opinion, as the claim unit should function. I worked with some very capable, intelligent, and honest people. And we were just not able to do the job that we wanted to do.

Mr. Martin replied, "If you cannot take the fire, you have to get out of the kitchen."

Q Okay. Now, let's cover -- All right, to your knowledge, Mr. Noxon still works for State Farm, doesn't he?

A Yes, Mr. Noxon works in the St. George office.

* * *

[17] * * *

Q All right, now, do you recall that in your various claims meetings that there was an emphasis on keeping average paid claims down?

A No.

Q Okay. Maybe we ought to look at your deposition and see if we can refresh your memory. Would you turn to page 131?

[18] A Okay.

Q On line number 8. Are you with me?

A I'm with you.

Q I'll read the question. "What I'm saying is, have you sensed any pressure or influence or incentive on the superintendent that pertains to the loss ratio or average paid out on claims?" And your answer?

A "Oh, sure." You're asking me about the superintendent, not me.

Q Okay. There was pressure on her, then, to reduce the average paid claims?

A Oh, I'm sure. I'm sure.

Q All right. I understand.

A But not on me.

* * *

[22] * * *

Q Now, was there much emphasis on first contact settlements?

A I didn't understand what you're asking me.

Q All right. Do you know what a first contact, or first call settlement is?

A Yes.

Q Do you have emphasis to you and to others that you were familiar with regarding the need to have more first contact settlements?

A Yes.

Q And you recall, as well, the emphasis on trying to control the claimants?

[23] A I don't know what you mean by controlling the claimant.

Q Well, let's turn to 125 in your deposition, please, and let's read what you talked about regarding controlling claimants.

A Okay.

Q On line 18.

A Uh-huh.

Q You indicate, "And in that way try to control a person from seeking legal counsel."

MR. BELNAP: I think he's entitled to have the context of the following two questions, and have the whole thing read.

MR. HUMPHERYS: I have no problem with that.

Q (BY MR. HUMPHERYS) That was your word, wasn't it, quote, "control"?

A Yes, but -- That's my word.

Q All right. Now, why don't we go back to page 124 and start on line 23, and I'll give you the -- Well, let's go back up to 15. The question was, "Any other areas that you recall on this subject that were discussed in your meetings"?

Would you please read your answer?

A Yes. "We discussed the BI proficiency reporting system that was continuously being discussed [24] and refined and changed. One of the reasons for that is that State Farm feels if we can get to the claimants before an attorney can get to the claimant, we can control the costs better."

Q And then I asked, "In terms of instructing or giving direction as to what ought to be done, or what not to be done in treatment, or how -- What do you mean?"

A "Well, statistically we can show that we pay less money to people that are not represented than we do to people that are represented. Now, why that is I don't have the answer, I don't know."

Q And my question was, "And so in that regard, what was the discussion in terms of what was -- What did they want you and others like you to do?" And your answer?

A "They wanted me to contact every claimant within twenty-four hours of assignment on a face-to-face, eyeball-to-eyeball basis. They wanted statements, medical authorizations, within, well, I said that's not correct, a contact within twenty-four hours, face-to-face contact within five days."

Q All right. And now read your remaining answer.

A Okay. "The purpose, of course, is many fold. [25] To introduce yourself, who you are, what assistance you can be, get medical authorization so you can gather the medical information, and in that way try to control the person from seeking legal counsel."

Q Thank you. Now, there were contests, weren't there, at State Farm, regarding who, which unit achieved the highest first contact settlements?

A Yes.

Q And that was called pride month?

A Pride month.

Q And there were awards given to who could do the first contact settlements?

A Each unit. Not individual.

Q Right, the units would be against each other.

A That's correct.

Q Did that occur over a period of years?

A Yes.

Q In addition to prizes, were there recognitions in the form of some kind of publication that was circulated?

A The pride month?

Q Yes. In other words, the winning unit would have some writeup, as well, in some publication?

A Well, not about pride month. There were other publications, or other things such as pride month [26] that would be written up. But pride month was primarily a pizza-winning deal.

Q All right. But there would be other publications where winning units would be recognized?

A Oh, yes.

Q Now, one final question, Mr. Jensen. Do you recall an excess verdict being rendered under Paul Short, superintendent Paul Short's unit?

A I recall some folks in the Ogden office saying that there had been an excess verdict, but what the verdict was, or what case it was, I had no information.

Q All right. And that would be under the jurisdiction of Paul Short, wouldn't it?

A It would.

* * *

CROSS EXAMINATION BY MR. BELNAP:

* * *

[35] * * *

Q I want to talk to you about a subject that Mr. Humpherys asked you about, and that is -- Let me lead into that. You've indicated to the jury that the majority of the claims that you handle, there's an attorney already involved; is that right?

A That's correct.

Q I take it, though, that there are some occasions every day, or during the week, when you may be dealing with somebody who does not have counsel; is that true, Mr. Jensen?

A I would say probably 5 percent of my cases [36] would be unrepresented. I have 125 cases that I'm presently working on.

Q All right. In evaluating a case, do you put a different value on a case if a person does not have an attorney, as opposed to whether an attorney calls you? And that wasn't a very good question, let me rephrase it.

If you have a situation where you know counsel's involved, do you evaluate that case any differently than you do if a person without counsel contacts you and talks about their claim?

A As far as I'm concerned, I don't care whether the person has counsel or not. I evaluate the claim exactly the same way.

Q Okay. Now, you've indicated to Mr. Humpherys that sometimes payments are more if a person has an attorney. And I think, if I recall your deposition correctly, you're not sure why that may be, and I want to ask you ā couple of questions about that.

In thinking about that, Mr. Jensen, and if you need some time to think about it I can go to another area and come back to it. But in thinking about an attorney involvement, if State Farm does pay more than what you had previously evaluated a case at, can you give the jury some idea why that may happen?

[37] A Well, I may evaluate a case at, let's say $20,000 for just a throw-out figure, and the policy holder that we insure only has a $25,000 liability limit. Now, I would evaluate that case at $20,000. However, my superintendent may take into consideration the defense, cost of defending the case, and may therefore authorize more money to be spent to settle that particular case.

Q Okay. Have you ever confronted a situation in your years of claims handling where a person goes to see an attorney, and there's increased medical expenses that are incurred in the process?

A Yes.

Q Can you tell us whether or not there are, you've had any experience, if there are attorneys in the area that you deal with here in the Salt Lake valley, who refer clients to medical practitioners, certain medical practitioners, to increase their expenses?

A Yes.

Q Does that, perhaps, factor into evaluations, if attorneys get involved? Can you tell us one way or the other?

MR. HUMPHERYS: Objection, this is foundational. I think he said he doesn't know how the statistics are based. I think that it rises to the [38] level of speculation, and is suggesting and leading the witness.

MR. BELNAP: Let me ask a couple of foundational questions, Your Honor, if I could.

Q (BY MR. BELNAP) In your thirty-plus years of experience--and I more would like you to focus more on recent experience, say, in the last ten or fifteen years, Mr. Jensen--have you had an occasion, in the thousands of claims that you've handled, where counsel has been involved, to be able to observe whether or not there are certain attorneys that you believe refer their clients out to certain health care professionals for treatment regimes? That just calls for a yes-or-no answer.

A Yes.

Q And can you tell us what you have observed in your experience in that regard?

MR. HUMPHERYS: Same objection, Your Honor, as to foundation. He has no knowledge of what attorneys do or don't do, and he's not in a position to do that. I think it rises to the level of speculation.

THE COURT: I'll allow it, and allow it to be pursued in redirect, as well.

THE WITNESS: I find it peculiar when I handle a case that a person would go to an attorney [39] first, before even seeking medical attention. When I get a case such as that, there's a red flag that goes up to me, and I would look at that case much more carefully than I would some older woman breaking her hip, for example, in an automobile accident. If this answers the question. I'm not sure what you mean.

Q (BY MR. BELNAP) My partner indicated he's having a hard time hearing you, and maybe the jury is too. Can you hear him all right? Okay.

Another factor I want to ask you if you have any knowledge whether or not this could enter into any of the reasons why, at times, more money may be paid if an attorney is involved than not. Are you aware, from your experience, whether or not, typically in bodily injury cases, attorneys charge on a percentage fee basis?

A Yes, they do.

Q Have you had any discussions with attorneys where they have indicated that their client needs to net out a certain amount from the settlement over and above what the fee is?

A That's quite common conversation.

Q Mr. Jensen, there may have been an implication given in your testimony that you would encourage someone not to see an attorney. I'd like you [40] to refer to page 91 of your deposition with us, if you could.

A Ninety-one. Okay. Where?

Q Starting with line 4, could you please read your answer to that question to the jury?

A "Yes, I -- People quite frequently will say, 'Well, I'm going to get an attorney.' My response always is, 'I think you certainly have a right to one. If you feel you should have an attorney, then by all means retain one. If we can't, if we cannot work this out to our mutual satisfaction, that is what's available to you under our civil laws.' And I'm a firm believer in, as you are aware, civil rights."

Q Mr. Jensen, could you tell the jury whether or not, in your mind, as a claims adjuster, do you feel that you can treat, or do you feel whether -- Can you tell the jury whether or not you feel you treat a person making a claim as fairly with or without an attorney?

A I treat the people the same way, one or the other. It doesn't make any difference to me.

Q Now, I realize you indicated that currently, as you work with Mr. Brungard, a lot of your communications on files is through memos. Do you still have some meetings currently, with your current superintendent, where you review files?

[41] A No.

Q In the past has that been a practice, where you've, say, had a weekly or periodic file review to discuss files and determine the best course for settlement?

A Yes.

Q In talking with your superintendent about that subject, can you tell us whether or not you have discussed what is in the best interests of the insured during those meetings?

A When I discuss a case with my superintendent, primarily we discuss ways of handling the claim to a successful conclusion, whichever that might be. Legal way, without legal, or whatever.

Q And I just need to know, in that process, do you consider, as part of the decision-making process, what is in the best interests of the insured?

A Certainly. My job is to protect the insured. That's what I get paid for.

Q Have you been taught that consistently at State Farm?

A Absolutely.

Q What have you been taught at State Farm over the years in terms of whether or not you should try to approach the settlement process in a fair manner?

[42] A What I've been taught?

Q Yes.

A I've been taught that, to treat people as fairly as possible, not being Santa Claus, and attempt to negotiate and settle the claim as amiacable as possible. With or without an attorney.

Q Mr. Jensen, having worked at State Farm for over thirty years, can you tell us whether or not you think the system, one way or the other, is fair or unfair in your dealings with people that are making claims?

A People I work with are highly competent, qualified people. I respect them. I believe the system we have at the present time is very fair, very equitable, and works very well. I have handled thousands and thousands of claims, and I believe I've only had maybe one or two insurance department complaints in my thirty-three years' career.

Q Now, in the handling of claims, have you had occasion where some of your claims have not been able to be settled, Mr. Jensen?

A Yes.

Q And have you had cases that you've worked on go to trial?

A Yes. I have never lost a case in [43] thirty-three years.

Q And when you talk about losing a case, what do you mean, Mr. Jensen?

A I mean by -- I have always been able to either settle the case for what I believed the case was worth, or a jury would come back with a verdict which was at the amount that I believed the case was worth. And the case was settled.

Q There was some discussions with Mr. Humpherys about -- I'm moving to a different subject, now.

A Okay.

Q -- about first contact settlements. Have you ever received any emphasis or directions that you should go out and try and settle claims for medical expenses only, if the person's entitled to damages over and above that?

A Never.

Q Has that been a practice that you've seen utilized at State Farm on a widespread basis in terms of training, Mr. Jensen?

A No.

Q When you sit down and talk with a person who does not have counsel, have you ever sat down and explained the concept of general damages to the person?

A Yes.

[44] Q Tell the jury what you typically tell a person about general damages, if the person's been injured and appears to have a bona fide injury and has some medical expenses?

A I explain to the claimant, or the person, that he's entitled to compensation for his pain and suffering, and of course the next question is, "Well, how much money is that?"

And I'm not sure how to respond to that exactly, but I usually tell people that, based upon my experience with similar cases, with similar injuries, similar circumstances, I believe a case to be worth X-amount of money.

Q Now, if that discussion takes place at a time when you have authority on the file, has that authority been placed on the file typically within an evaluation that you've given in a range?

A I have field authority on my own.

Q Okay. And tell the jury what that means.

A That means that I can go out and settle the case with a claimant based upon what I believe the case is worth, up to a certain amount of money.

Q All right. And if you go over that field authority, then you have to talk with your claim superintendent?

[45] A I have to make out a request for authority, a typewritten four-page detailed report that would go to my direct supervisor, superintendent.

Q All right. And if authority is placed on the file on a case that exceeds your personal authority, and you sit down with a person that's not represented, do you negotiate with those people?

A Certainly. That's my job.

Q Do you attempt, in that process, to approach that process in a fair manner, however?

A Yes.

* * *

[46] * * *

Q All right. Are you aware, generally, Mr. Jensen, if there have been excess verdicts? In other words, a verdict rendered in excess of an insured's policy limits, that have occurred here in the state of Utah?

A Yes.

Q Can you give the jury your understanding as to whether or not that frequently occurs, or very infrequently?

A I would say that would occur very, very infrequently. I only know of about three or four cases that have been mentioned to me as excess jury verdicts. I don't know the particular cases, the case numbers, or claim numbers. Just what other adjusters have told me from outlying offices.

Q Have you ever had a case that you've handled that has resulted in a punitive damage award?

A No.

Q I want to move to a different subject. I want to talk to you about the subject of average paid cost, or loss ratios that Mr. Humpherys talked to you about.

First of all, have you ever been in a contest [47] where you were being evaluated for reducing, allegedly, average paid cost or loss ratios, Mr. Jensen?

A I'm not sure -- If you're talking about a contest of which unit can settle more cases in a given period of time? Is that what you're asking me?

Q No, that would be reducing pendings, would it not?

A Yes, it would.

Q Okay.

A I don't, as an adjuster, concern myself with average costs. That is a function of the superintendent, and the divisional claims superintendent. Whatever they do about that, I have little knowledge about.

Q All right. Let's go back and talk about pendings, and then I'll come back to the answer that you gave, that that's a function of a superintendent or manager. Tell the jury what pendings means in the claims arena.

A Well, it simply means how many cases you're presently working on. And there have been some contests between different offices to see who could reduce their inventory at a 15 percent reduction, 10 percent reduction, or whatever, over a given period of time.

Q Do you have a problem with reducing your [48] inventory of cases?

A No.

Q And if, as you've told the jury, 95 percent of your cases have attorneys involved, representing the other side, how do you reduce your pendings? Do you do it by underpaying files, or do you do it by working the file? Can you tell us what you do?

A You do it by settling the files.

Q Now, in terms of loss ratios, or average paid, you told us that that is something that's handled at the management level; is that correct?

A As far as I'm aware, I believe that's -- Whether or not adjusters get involved with loss ratios, I really can't say.

Q Okay. In your -- I think you said you've been here since '68, did you?

A '67.

Q In the years that you've been here since 1967, has anyone ever pressured you to evaluate a particular case one way or the other, based upon whether that affects the loss ratios, Mr. Jensen?

A Well, I've been pressured by divisional claim superintendent Bob Noxon in the fact that, or -- "Pressure" is not the correct word. Influenced to reduce what I believe a case would be worth.

[49] Q Okay. You told us that is some, that there were times when he disagreed with your evaluation.

A That's correct.

Q And I'll come to that in a minute.

A Okay.

Q But has anybody ever come to you and said, "Felix Jensen -- " Let's put aside Bob Noxon for a minute.

A All right.

Q Because we'll talk about him. I want to talk about him. Putting aside Bob Noxon in any regard, has anyone in your years in State Farm, from '67 to the present, ever said, "Felix Jensen, we want you to evaluate this particular case one way or the other, because we want you to reduce your average paid costs"?

A No, I'm known in the company as an ornery old cuss, and I don't believe anybody would come up to me and ask me to do that. Because they would know what my response would be.

Q Okay. How about other claims people?

A I have no information about other people. I don't know.

Q But that has not been something that's been taught in unit meetings or other things that you've been present at with claims people; is that right?

[50] A Not that I'm aware of, or not that I recall.

Q Okay. Going back to pendings for a minute, if you attempted to reduce pendings by underpaying files, what would happen in that regard, in your opinion?

A Your pendings will probably double or quadruple.

Q So how do you reduce pendings, Mr. Jensen?

A You reduce pendings by settling the claim.

Q And so returning to the question that I asked you a moment ago, has there ever been an occasion where you've been given a reward, even a pizza, or some incentive, to reduce your loss ratios?

A No. Pendings, yes. Loss ratio --

Q Okay. I want to move to a different subject, Mr. Jensen. Have you ever modified a file to change a document in there, in the file, in a way that you would consider improper at any time?

A Never.

Q Now, talking about Mr. Noxon for a minute, you have told this jury that there were occasions when Mr. Noxon disagreed with your written evaluation or request for authority; is that correct?

A That's correct.

Q I want to talk about that, Mr. Jensen, [51] because I think there may be a misunderstanding about that, and I want to be clear on what your testimony is.

A Okay.

Q If Mr. Noxon has disagreed with your request for authority or evaluations, has he ever directed you to change a written document, or to change the file, as opposed to simply disagreeing with your evaluation?

A He has never asked me to change any report, whatever. He would know better than to do that.

Q Okay.

A As I told you, I trained him. And at least I think I taught him that. I hope.

Q But he has disagreed with you in terms of your evaluations from time to time.

A On many, many, many times.

Q Okay. Has Mr. Noxon ever threatened you, Mr. Jensen?

A What do you mean by "threatened"? We're going to get in a fist fight?

Q No. I'm referring to your deposition where you indicated that you'd never modified a file, on page 176, and then Mr. Humpherys asked you, "Was your job ever threatened by not adhering to what Mr. Noxon suggested be done?"

And Mr. Humpherys continued, "By not [52] following through on what he suggested be done?" And your answer on line 8 was what?

A "Mr. Noxon has never threatened me in any way."

Q I want to talk to you about a different subject, Mr. Jensen, and let me just lay a little bit of ground work, if I could, with the court's indulgence.

I'll represent to you that in approximately January of this year Judge Bohling asked State Farm to make a search of offices in the state of Utah to see if any additional manuals, materials, things like that, could be located in the various offices. And I'll represent to you that Paul Short sent an E-mail around indicating to the various offices that he would be coming and looking through those offices to see if additional manuals and materials could be located.

Are you aware, generally, Mr. Jensen, that you were advised that a person would be coming to the various offices to look for materials?

A I don't believe I received the E-mail because I was in Florida during January and February. But as I've said before, if you want to look at my desk, Paul, you're welcome. Any time. I don't lock it.

Q So that did not cause you a problem?

A Not at all.

[53] Q Now, when you're doing your job as a claims adjuster, do you like to have the most current manual or materials available to you, rather than getting confused with things that may be outdated, or no longer in use?

A Well, I've been married to the same woman for thirty-eight years, and I look the same way at my manuals. I have all my manuals that I've ever had. I feel comfortable with them. Some of them are not up to date or pertinent, but there's still some information in there that I use every day. And I have most of them.

Q Do you have a problem with State Farm, Mr. Jensen, wanting its employees to use current materials?

A No. That's certainly their right.

Q I want to talk about pride month for a minute. That maybe is taking us back to something we talked about for a minute. But in pride month, was the unit attempting to reduce pendings as a unit?

A Well, that was one aspect of pride month.

Q Okay. Was there also an effort to try and make referrals to agents?

A Yes. Agency referral cards.

Q Okay. Was there anything else in pride month?

A Reduction of pendings, agency referral cards, [54] first contact settlements, generally being perceived as helping out agents whenever possible. A number of things. I don't recall very specifically each item.

Q Okay. Let me just add -- Let me draw a line, here. And we've got agents, and then first contact. Now, can you tell the jury whether or not, on a first contact settlement, you would settle with a person who had a continuing injury and was continuing to treat?

A No, you would be crazy to do that. First contact settlement would usually occur if you had a relatively minor injury type of case, and you would be able to offer the person or persons some money for their inconvenience, the pain and suffering which they felt was acceptable, and so you therefore settled the case right at the time you talked to the person the very first time.

But this will only be for a very trivial, minor, in my opinion, anyway. That's how I would use -- I don't know how other people would do this.

Q Okay. Has there been an occasion in your years at State Farm where you've made a settlement of a case early with a person, say, a young person, young man gets, or boy or child gets hit by a bicycle, they have an emergency room visit, they appear to be just fine, [55] and you sit down and work out a settlement with the parents, and at a later time it turns out there's a more serious injury. Have you ever had that occur, where the parents have come back and asked to have that re-evaluated?

A Yes.

Q Can you think of an example like that, Mr. Jensen, in your career?

A A particular case? No.

Q Okay.

A But I can think of five or six cases where that might have occurred.

Q And when those people have come back to you at State Farm, have you received their claims for additional compensation, evaluated those, and re-opened the matter?

A Yes.

Q I want to ask you if you can recall a case--and see if this refreshes your memory, Mr. Jensen--where you handled a case where a small child was hit on a bicycle on the avenues, and the medical bills were paid, it appeared that the young child was just fine, and six months later the child developed epilepsy. And the parents returned and asked for re-evaluation of the case, and State Farm, through your [56] handling of the case, paid an additional quarter of a million dollars to resolve that?

A I recall handling several cases like that. One was on Eighth Avenue and E Street, where our insured backed over a child, over the child's head. At that particular time it did not appear to

be -- It was injured of course, but not significantly seriously injured, and later determined that the child was, in fact, injured more than we thought originally. It's not that uncommon with children.

Q When the parents on that case came back to you, did you try to hoodwink them into saying, "You'd already settled, don't talk to me further"?

A No.

* * *

[57] * * *

THE COURT: Before you begin your redirect, Mr. Humpherys, there have been a number of applications to allow you to proceed by leading questions, which I denied. I've heard enough testimony now to be satisfied that the criteria necessary under Rule 611-C have been met, and you may proceed by leading question, and may fully explore the areas that you've sought to go into previously. I believe they were covered in cross examination, so they'd be fair game for redirect anyway, but I want to make sure that record is clear.

MR. HUMPHERYS: Thank you, Your Honor. I'll have Mr. Christensen find a PP&R while I cover some other issues.

REDIRECT EXAMINATION BY MR. HUMPHERYS:

Q All right, Mr. Jensen, you've raised a few [58] issues that I would like to cover. Regarding this meeting in 1979 where Mr. Summers spoke on phony memos, he would write memos with less authority than he actually had, wouldn't he? That was part of his phony memo process; isn't that correct?

A I would think he would be writing memos, giving himself more authority than what he had as far as field. There would be no purpose of him writing a memo for less authority. Is that what you're asking me? I'm not sure.

Q I'm asking you -- Mr. Summers testified that he would receive authority to settle a case, say, for example, for $10,000.

A Okay.

Q Then he would write a phony memo that says, from his superintendent, that says, "I only have authority for $5,000." And then he would take that phony memo to the claimant and say, "I'm sorry, all I've got is $5,000," and try to settle it for five. Now, that's the way he was portraying it, wasn't it?

A It's been so long that I don't recall how he exactly portrayed it.

Q But that's about the way it was, wasn't it?

A Yeah, but there wasn't anything -- I think you're trying to imply he was doing something wrong, [59] here.

Q And you didn't think there was anything wrong?

A Well, the meeting that we had was a round table discussion of how to handle claims. There wasn't any right or wrong issue.

Q I understand that. You've explained that. Wasn't one of the reasons that you said you were having this meeting is because you understood State Farm was losing money, and there needed to be some way to start helping reduce the amount of money being lost?

A No, State Farm advised us by memo or by unit meeting, I don't recall which, that they have had a rather disastrous underwriting loss in 1979, and they were looking at ways to improve the handling of claims.

Q Right. And obviously, for the goal of paying less, I assume, wouldn't that be true, if you were having problems with money?

A That could be one part, yes.

Q Okay. Now, do you recall, during your deposition, that I showed you the superintendent's manual, claim superintendent's manual, and we reviewed where there was a section that said, "If you follow these procedures you can settle for the medical expenses only, or the actual costs only." Do you remember when [60] we saw that?

A The manual you showed me, or I don't know what manual it was or who it came from, but it was a bunch of baloney.

Q You thought that manual was baloney?

A That's right.

Q And you thought the principles that were set forth in it were baloney?

A A bunch of baloney.

Q You didn't think that was proper claims handling do you?

A Absolutely not.

Q And you don't know to what extent that manual was used throughout the company, do you?

A I don't know what that manual was, or where it came from. I've never seen it before you showed it to me.

Q That was a superintendent's manual. You would not have access to that because you were not a superintendent; is that correct?

A No.

* * *

* * *

[62] * * *

Q You talked about a claim involving a child where you opened it back up and paid more money on it.

MR. HUMPHERYS: Your Honor, we would formally request that, since that was addressed in detail, that we have the opportunity to see that claims file, and that that be produced.

THE COURT: Do you have it here?

MR. BELNAP: That was referred to in a 1983 deposition, and the name of the case was never given. That was in a deposition taken by Mr. Summers' attorney, Your Honor, in the case brought against State Farm by Mr. Summers' attorney, and the case was never identified by name. If he can give us a name, we'll see if the file still exists.

THE COURT: All right. Well, I think it's appropriate that it be produced if it's available.

Q (BY MR. HUMPHERYS) Can you tell us the name, please?

A I'm sorry, I'm not that intelligent to remember that far back.

Q Was there a lawsuit involving that case?

A I believe so.

Q And so State Farm wouldn't pay more until the [63] child brought a lawsuit; isn't that correct?

A I don't know. I don't recall.

Q All right. And so how much was the initial settlement of that case? Just a few thousand dollars?

A I don't recall.

Q And then you turned around and settled for nearly a quarter of a million dollars; is that what you said?

A That's what Mr. Bennett, I mean Mr. Belnap said, not me.

Q And that was after a lawsuit had been commenced against State Farm, isn't it?

A I don't know.

Q And we don't have the file.

A I'm sorry.

Q Okay. You agree, Mr. Jensen, wouldn't you, that you, in dealing with claimants, have a duty to be fair with them?

A Absolutely.

Q And that's based upon your standards in the industry of insurance adjusting; isn't it?

A It's based upon the -- Yes, and also the Utah Unfair Claims Practices Act. It's very specific.

Q That requires it too?

A Yes.

[64] Q And you've always tried to do that, haven't you?

A Yes.

Q Now, let's talk about some of the cases that you've mentioned. You said you'd never lost a case, and then you defined what loss and win means. Are you here to tell the jury that in all of your career you have never paid less than fair value in any claim at any time?

A No.

Q No to the --

A If you can tell me what fair is, maybe I can -- Because I'm not sure I know what fair value -- I'm still working with that concept, after doing this work for thirty-three years. I'm not sure I know what fair value is. I don't know, other than --

Q I'm just asking you, in your opinion, Mr. Jensen, do you feel, in your career, that you've always paid fair value on every claim?

A I would be a fool to sit here and tell you that I've done that. I'm sure I've made mistakes in my life.

Q Okay. Now, let's talk about that win-loss situation. In those cases where you have gone to trial, and the verdict, as you have described it, comes in for [65] less than what your previous offer had been, was your opening offer in those cases the same as your last offer?

A No.

Q Do you typically offer less and then go up?

A Yes.

Q And isn't it also true, Mr. Jensen, that typically you don't offer the top dollar until just before trial?

A That's correct.

Q And so you force the claimant to go all the way through litigation before you offer the top dollar; isn't that correct?

A I don't force the claimant to do anything. They do whatever they want to do. I don't tell them what to do, ever.

Q Isn't it correct, Mr. Jensen, that a person who has been injured and is seeking compensation cannot recover attorneys fees when he is bringing that claim?

A I don't -- I'm sorry, I don't follow you.

Q If a claimant has been injured and is seeking damages from State Farm and seeking reimbursement for benefits coverage, isn't it true that if he or she hires a lawyer she cannot recover against State Farm for the attorneys fees?

[66] A I think the court decides that, not State Farm.

Q Okay. I'll represent to you that that's the law, except as it relates to bad faith cases. In that case the court can address attorneys fees. Does that sound right to you?

A Yes.

Q All right. So if a claimant cannot recover attorneys fees, and a claimant is forced to go into trial in order to get the recovery, isn't State Farm forcing them to lose a percentage of their claim because of having to pay attorneys fees?

A You're asking for my personal opinion?

Q Yes. Isn't that true?

A I would say that's true, yes.

Q Okay. Now, in your thirty-three years of experience with State Farm, you've known that the typical way to handle these kinds of claims by attorney is a contingency fee, right?

A Yes.

Q And that's very well known in the industry; isn't it?

A Certainly.

Q And that's foreseeable that if State Farm or any insurance company refuses to pay a claim and forces [67] the claimant to file a lawsuit, that there will likely be a contingency fee charged to the complaint; isn't that right?

MR. BELNAP: Your Honor, I think that that is a mischaracterization, and also without foundation as to, does the question assume that there's an attorney involved before a lawsuit's filed? Because if there is, obviously if there's a contingent fee contract, or a percentage --

MR. HUMPHERYS: Your Honor, we've got a speech that's being made, here, and I'm entitled to lead the witness, and he can explain it any way he wishes.

THE COURT: All right, overruled.

Q (BY MR. HUMPHERYS) All right, now, let me see if I can rephrase the question again, Mr. Jensen.

A Okay.

Q Isn't it foreseeable, as an insurance representative that you are, that if an insurance company refuses to pay adequate and fair value on a claim, and the claimant therefore has to retain an attorney and bring a lawsuit, that there would likely be a contingency fee associated with that claim?

A Well, I think under most circumstances the company would offer a fair and equitable settlement. At least I would, if I were handling the case.

[68] Q Let me have you assume that a company does not -- any company, I'm not limiting it to State Farm, but I'm including State Farm -- assuming a company does not pay, or offer a reasonable value to a claimant, and a claimant is forced to hire an attorney to bring a claim, isn't it foreseeable, Mr. Jensen, that in all likelihood that would be based upon a contingency fee from their recovery?

A Certainly. But if an insurance company were to do what you're saying, that would be in violation of the Utah Unfair Claims Practices Act. They'd be in bad faith.

Q That's correct. And the jury's already found State Farm in bad faith in this case?

A I have no idea what the jury has found or not found.

Q All right. Mr. Jensen, did you call it horse trading? There's some negotiations back and forth? Is that what you call it?

A Yes, uh-huh.

Q So if a claimant first files a claim -- Let's assume it's a smaller claim, and you have authority for, say, $8,000, and a claim has been made. Would you typically start offering, maybe $5,000, and then try and horse trade up? Is that the normal [69] process?

A With an attorney?

Q Or a claimant?

A Or a claimant.

Q You'd typically go --

A It would depend on the circumstances of the case. The injuries involved, the specials. A whole host of things.

Q Okay.

A If I felt the case had a value of $8,000, I would probably offer the person $8,000. If I felt right about that.

Q And isn't that true, that in your deposition you say you usually offer less?

A That's true.

Q Okay.

A Usually, uh-huh.

Q All right. And then you would expect to horse trade back and forth until you got up to the $8,000; is that right?

A Yes, that's correct.

Q And isn't it true, as well, Mr. Jensen, that as you try and negotiate a settlement in this winning the cases, that you start lower, and you then go up until the point of trial?

[70] A I don't understand your question, I'm sorry.

Q I think you've already answered that previously, I think it's a repetitious question.

All right, now, let me cover a couple of other things with you. Isn't it true that State Farm fights vigorously what they consider to be buildup cases?

A Yes.

Q And buildup cases are those cases which, in their opinion, it believes that the plaintiff is trying to get more medical expenses in order to build the case.

A Yes, the claimant is overreaching. We fight those cases.

Q And when you were talking about the average amounts paid on an unrepresented claimant versus those that are represented, and you said, "Maybe the reason why it might be higher with represented counsel is because maybe the attorney might be trying to build up the case." But isn't it true State Farm fights those buildup cases?

A Yes.

Q There's nothing wrong with fighting those that are overreaching, or that are building up their files. There's nothing wrong with that, is there?

A No, I do that routinely.

[71] Q And you fight those vigorously, don't you?

A Yes, I do.

Q All right. So perhaps they aren't part of the statistical reason why cases are higher when they settle.

A I told you in my deposition, I didn't know. And I still don't know.

Q All right, you still don't know.

A No.

Q All right, now, you said in response to Mr. Belnap, that in any of your PP&Rs you had never concerned yourself with reducing the average paid costs, or the costs of indemnity.

MR. BELNAP: That's a misrepresentation, Your Honor. I didn't ask him about PP&Rs. I did ask him if there were any incentives, in pride month, et cetera.

MR. HUMPHERYS: Let me back up, I'll accept what you've said, Mr. Belnap.

Q (BY MR. HUMPHERYS) Aren't PP&Rs a form of addressing what you ought to be doing?

A Yes.

Q Trying to influence you to achieve certain objectives?

A Yes.

Q And certainly salaries and bonuses and [72] promotions and so forth, they're tied into how well you do on your PP&R, aren't they?

A Yes.

Q All right. Now, do you recall in your PP&R, the fact that your superintendent imposed upon you a duty to assist the unit in achieving the goals of reducing the paid costs?

A I didn't hear your last.

Q Isn't it true in your PP&Rs --

MR. BELNAP: What page are you referring to, counsel?

MR. HUMPHERYS: I'm referring to page 05237 in Exhibit 51, volume 2.

Q (BY MR. HUMPHERYS) You recall in your PP&Rs having an objective set by the superintendent for you to assist in achieving the goal of having the costs contained?

A Yes.

MR. HUMPHERYS: Trial page 838, Bates stamp control number 05237.

Q (BY MR. HUMPHERYS) Isn't it also true in your PP&Rs that you have been given specific direction to increase the number of first contact settlements?

A Yes.

Q You mentioned, as it related to Mr. Noxon, [73] that he never threatened you regarding changing files or changing anything. Isn't it true, though, that he threatened your superintendent, Ms. Bird?

A Many times.

Q And that was to put pressure on you to do it, wasn't it?

A I don't know. I would assume so.

Q And weren't those little post-it notes that you've referred to trying to get Ms. Bird to tell you to start changing your evaluations?

A Yes.

Q And those post-it notes never become part of the formal file, do they?

A I would not know.

Q We've heard testimony from Mr. Bruce Davis about what he calls buck slips, these little post-its, where information, derogatory information and other kinds of things that might be harmful to the file if a jury were to review it, are written on these post-its, and are removed when the file goes into litigation. Do you know anything about that?

A They're not written by me, so I don't know anything about it.

Q But as far as you know, those buck slips never make it in, or those post-its never make it into [74] the file, do they?

A Not as far as I know.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF MILES JENSEN, JUNE 13, 1996

[Vol. 7, R. 10262, commencing at p. 4] * * *

MILES JENSEN called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.

A Miles Jensen.

Q And where do you reside, Mr. Jensen?

A In Logan, Utah.

Q Are you a practicing attorney in Logan?

A I am.

Q How long have you practiced law in the Cache [5] valley area?

A Since 1975, about twenty years.

* * *

Q Now, there's evidence in this case of some large verdicts that were entered against Mr. Campbell on September 20th of 1983. On September 22nd, two days later, did Mr. Campbell come to meet with you and your partner, Mr. Hoggan?

A He did.

Q And you were present there that meeting?

A I was.

Q Would you describe, Mr. Jensen, what Mr. Campbell's emotional state was when he came in on September 22nd?

A Well, he's not a person who shows a lot of emotion. I would say, though, that he was personally very devastated, distraught, troubled, bothered, just extremely, just all tied up in knots, I guess, is one [6] way of saying it.

Q Did he express concern over losing his home and other assets?

A Yes, he did.

* * *

Q Was there actually a rough list of assets made at that meeting?

A There was.

* * *

[7] * * *

Q Did you or Mr. Hoggan tell Campbell in that first meeting that he really didn't have anything to worry about?

A No, I don't think that would have been a fair assessment of his situation at all.

Q Were you deeply concerned yourself about what was going to happen to Mr. Campbell?

A Yes, I thought he was about as vulnerable as a person in that kind of situation can be.

Q Now, there's been discussion in this case that a person can't actually execute on a verdict, you have to have a judgment to start the execution proceedings. Do the court rules allow for verdicts to be turned into judgments fairly quickly?

A Yes, it's, customarily they are.

Q So, while Mr. Campbell wasn't subject to [8] having his property taken the day he came in, did you explain to him that that could begin happening within a few days?

A Yes, there would be -- I'd not have expected something for at least one to two weeks, but as it turned out I think within about one week a proposed judgment was submitted to the court.

Q And that ultimately was not signed until November?

A Yes, towards the latter part of November.

Q But we're now dealing from hindsight. At that time did you explain to Mr. Campbell that realistically it could be a matter of days?

A I would have indicated to him that it could be a very short period of time.

Q This is a letter which the jury has now seen several times, I'm going to move to the second page and point out these initials, here. MPJ. Are those your initials?

A They are.

Q Does that indicate that you actually prepared this letter?

A That's an indication I did prepare the letter.

Q Do you recall that you're the one that did [9] most of the work on preparing this letter?

A Yes, it was reviewed by Mr. Hoggan and he made a few revisions, and I made some additional revisions, and then it was signed and sent.

Q Okay. Why did Mr. Hoggan sign it instead of your signing it?

A Because he was the senior partner in the firm, and he, I think, had known Wendell Bennett for many years, and I think it was hoped that his signature would carry more impact than mine would.

Q Let me review this with you, if we can. Would you read that first paragraph, please.

A "We have been retained as counsel for Curtis Campbell to the above-captioned matter. He has made us aware of a judgment which has been entered against him for the sum of $250,000 on behalf of the plaintiff and cross defendant in the above-captioned matter. We are advised you handled the defense on his behalf, as well as on behalf of the insurance company, State Farm."

Q Would you go on, please.

A "Based upon the facts of this case, it is our opinion that there has been a breach of fiduciary duty on the part of your client, State Farm Insurance Company, to its insured, Curtis Campbell, in deliberately and intentionally refusing to settle these [10] cases within the policy limits, when clearly both parties proposed such offers of settlement."

Q Would you go on, please.

A "State Farm's liability is further pointed out by the fact that State Farm Insurance Company never made, so far as we are aware, any attempt to compromise or settle these claims whatsoever, that from the outset State Farm always took an absolute and firm position that there was no liability or risk of liability on the part of their client, and therefore refused to make an offer of settlement for even one dollar."

Q Okay, let me have you go on, please.

A "This letter is to advise State Farm Insurance Company, through you, of the foregoing, and also that our client looks to State Farm Insurance Company for payment of these judgments in full."

Q Let me stop you right there. When you wrote that, did you have in mind State Farm paying them six years later?

A No.

Q Were you looking for immediate protection for Mr. Campbell?

A Yes. That was what had to happen.

Q Okay, let me have you move on.

A "That Mr. Campbell considers it the duty of [11] State Farm Insurance Company to take all steps which can be --"

Q "Which can be taken"?

A Yes, I'm sorry, thank you. "Which can be taken to set aside the judgment, to attempt to have the matter retried if there are facts and a basis upon which to do so, and further, that it remains the responsibility, now that Mr. Campbell's defense has been undertaken by State Farm, to pursue any avenues of appeal which may reasonably be made under the circumstances."

Q Let me stop you right there. So there's a reference in there to taking steps, if there's a basis for it, to try to set the verdicts aside. Would that have in mind post-trial motions?

A Correct.

Q Did you advise Mr. Campbell of what the realistic chance of that was?

A Yes, in my experience it's very rare.

Q And it didn't happen in this case, as far as those being successful; is that true?

A They were all refused.

Q Okay. You've read down, I think, to the last --

A Two lines?

[12] Q Two lines. Would you finish that, please?

A "This duty is not the duty, so far as we can see, of our client, but is the duty of State Farm Insurance Company, particularly with their refusal and failure to settle a case within liability limits, when such could easily have been done.

"State Farm Insurance Company had a duty to notify or advise Curtis Campbell that there was significant risk of an adverse decision in the case, which never occurred. The only legal opinion and evaluation appears to have always been that there was absolutely no risk of loss or liability in the matter.

"Based on the facts that have been explained to us, State Farm should have known from the outset that there was a substantial risk of an adverse decision and risk of loss under the circumstances. We submit that State Farm did not exercise good faith, and did not take due care so far as their policy holder's interests are concerned.

"If, for any reason, State Farm fails to fully follow through on the matter to its conclusion, and, if an ultimate decision is adverse, to pay the same in full, we would look to State Farm Insurance Company, not only for payment in full of the judgment, but for substantial punitive damages. It appears to be clear [13] that State Farm has gambled a sizable amount of the insured's money in an effort to save a small amount of its own.

"We trust our position is clear, and that you will conduct yourselves accordingly. If you have any questions or comments, please advise."

Q Okay, now, you had concluded from the information you had that State Farm was guilty of bad faith in the way they treated Mr. Campbell.

A Based upon the information, yes.

Q Do you understand a jury last October and November, in fact, found State Farm guilty of bad faith in the way they treated Mr. Campbell?

A I am aware of that.

Q Was the purpose of this letter to tell State Farm that Mr. Campbell wouldn't hold them responsible for that?

A It was to tell them that he would hold them responsible for that.

Q Was your intent to hold State Farm responsible for what they'd already done, regardless of what they would do in the future?

MR. SCHULTZ: Your Honor, I object, this is leading, the letter speaks for itself.

THE COURT: Sustained.

[14] Q (BY MR. CHRISTENSEN) Let me ask it this way. Was the intent of the letter -- Let me back up. Had you inherited somewhat of a mess, here?

A That would be an understatement, I think.

Q Had Mr. Campbell already sustained some damage?

MR. SCHULTZ: Objection, Your Honor, calls for him to form a conclusion or speculate.

THE COURT: Overruled.

THE WITNESS: I think yes, very much so. He'd already had a big newspaper article about a $250,000 judgment against him, plus the trauma of sitting there in a courtroom, where he felt no fear, thought, "Everything is in hand," and then suddenly he's not covered and is told, maybe, "Put a for sale sign on your house."

Q (BY MR. CHRISTENSEN) When this letter was written that we've just reviewed, that you wrote on behalf of Mr. Campbell,

was the message that you were trying to convey that State Farm was not going to be held liable for any of that, as long as they paid the judgment whenever they chose to?

MR. SCHULTZ: Object, it's leading. The letter speaks for itself.

THE COURT: Sustained.

[15] Q (BY MR. CHRISTENSEN) Your reference in the letter to State Farm's being held responsible for punitive damages in the future, was that intended to convey the message, "We won't hold you responsible for what you've done in the past"?

A No.

MR. SCHULTZ: Same objection.

THE WITNESS: It was intended to say, "Stop this horrific experience for Mr. Campbell. Make it right, do everything you can now to get this square."

Q (BY MR. CHRISTENSEN) Now, have you been made aware that State Farm's taking the position in this case that they did just what you wanted when you wrote this letter?

A Yes.

Q Does that accurately convey what State Farm, in fact, did?

A No.

Q I'm going to review that with you. Mr. Jensen, did I show you a letter this morning that I found in Mr. Bennett's file that he sent State Farm after receiving your letter that we just read?

A Yes, you did.

Q I believe this is part of the undisputed documents in this case. Would you look at Exhibit 106, [16] please. Is that the letter that I showed you this morning?

A It is.

MR. CHRISTENSEN: We would move the admission of Exhibit 106.

MR. SCHULTZ: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 106 was received into evidence.)

Q (BY MR. CHRISTENSEN) This letter is dated October 7th, a few days after your September 29th letter. The first sentence says, "Enclosed herewith please find a photocopy of a letter received on October 4th, from attorney L. Brent Hoggan in Logan." Is it your understanding that that refers to your September 29th letter?

A That would be the only letter we had sent to Wendell Bennett prior to October 4th that he could have received, I believe.

Q All right, the letter goes on and says, "The letter is rather self-explanatory, and is obviously an attempt on the part of Mr. Hoggan to put as much pressure as is possible on State Farm to do whatever is necessary to keep Curtis Campbell from having to in any way respond to the judgment in excess of the policy [17] limits." Do you see anything in that letter that suggests to you that Mr. Bennett, State Farm's representative, thought that your letter said, "pay the judgment six years later"?

A No, that communicates exactly what we wanted to communicate, I think. It's an accurate portrayal. We wanted Curtis Campbell out of the loop and done.

Q At that immediate time.

A Immediately.

Q Did State Farm agree to provide such immediate protection?

A Well, they made some post trial motions, but other than that, no.

Q Was the device that would protect Mr. Campbell while this matter was appealed called a supersedeas bond?

A Yes.

Q And did they -- What position did they take on the supersedeas bond?

A That they would post a bond for their risk of their policy limits of $50,000, and leave Mr. Campbell bare, or to do whatever he could to post a 130 or $140,000 bond for the balance of the judgment.

Q Okay, let's get some numbers written, here. Were the total judgments around $185,000? Or should [18] I -- Let me do this. I'll show you the December 6th, '84 agreement, because it refers to the amounts of the judgments. We'll get into that more later. Would you read those amounts for me, please?

A A judgment for $133,098.25 in favor of Slusher.

Q $133,900?

A 0-9-8.

Q Okay.

A And $51,845 for Ospitals.

Q And does that have a total on it?

A No, but it would be about $184,843.

Q Okay. And State Farm's position was they would post a bond to stay execution on how much of this?

A $50,000. There may have been some minor costs or whatever, I don't know that we ever really discussed that because it never --

Q So if we want to round this off, are we talking about roughly $135,000 that State Farm was indicating they would not post protection for?

A That's correct.

* * *

[21] * * *

Q (BY MR. CHRISTENSEN) I'm going to show you another document from your file. Would you explain what that is?

A That is a list of the assets of Curtis Campbell that would have been brought into our office, I believe the latter part of November.

Q That's something that Mr. Campbell or his wife prepared?

A Yes.

Q And what is this note right here?

A That would be a little yellow post-it that would be on the original of that, where the receptionist has noted when it was brought in.

Q Does that indicate the date that you would have had that delivered to your office?

A Yes, it would be November 29th of 1983.

Q Now, does this statement list assets at the top, and then income sources at the bottom?

A It would be income sources, yes, uh-huh. [22] That's correct. And estimates of value.

Q This first asset, it says a contract in Richmond property, about $50,000. Would you explain what that was, please?

A That was on some real estate that Curtis had owned for a period of time and had sold on contract.

Q So did he have a contract right to receive $465 a month in income?

A That would be what it called for, I believe.

Q Was that contract right, as you explained it to him, subject to being taken through execution?

A Yes. To the extent that they were joint owners there may be some technical legal things, but his interest in the contract certainly could be.

Q And the next item, home in Lewiston, was that property where Mr. and Mrs. Campbell resided?

A It is.

Q Are these last few items, the income items, social security, Boeing retirement, and Utah state retirement?

A Correct.

Q What was the purpose for preparing that list of assets and income?

A We needed to be in a position to see what assets we could possibly protect from execution from [23] Mr. Ospital's family and Mr. Slusher, and to also evaluate what their general financial position was in terms of an appeal.

Q I think some people seem to have the understanding that if you just go put your assets in somebody else's name you can keep them from being executed on. Does the law provide for that?

A Not legally. It is sometimes done.

Q But the judgment creditors, if that's done, can they still get at the property if they pursue it?

A They can. It's considered a form of fraud if it makes you insolvent, or is without appropriate consideration when you have a creditor that you're simply trying to avoid.

Q Was there any question that it was in Mr. Campbell's best interest to have State Farm post a bond, not just for $50,000, but for the whole amount?

A Absolutely. Otherwise any asset in which he had an interest was at risk, if he had to try and pledge it to payment of the judgment.

Q And what did State Farm inform you was their intent in that regard?

MR. SCHULTZ: Object, it's been asked and answered.

THE COURT: Overruled.

[24] THE WITNESS: They basically left Mr. Campbell hanging. I mean they said, "Go to these people and see if you can cut a deal with them so we don't have to post a bond and you don't have to post a bond." Well, "So that you don't have to post a bond," I guess is more accurate.

Q By "these people," you're referring to who?

A Slusher and Ospital.

Q All right. Who was State Farm's spokesman?

A Wendell Bennett.

Q Did you deal with anyone else during this time frame who spoke on behalf of State Farm besides Wendell Bennett?

A No.

Q I'm going to put another document on the screen from your file. Is this your handwriting?

A It is.

Q I don't mean to insult you, but I think maybe you ought to help us read that.

A I don't want to insult you. It's hard for me to read it.

Q Let me hand you a paper copy, or do you have that? You don't. What's the date on that document?

A I believe it's December 1, 1982.

Q '83?

[25] A '83.

Q All right. Would you read the note, please.

A "State Farm is going to appeal. Wendell Bennett wonders if there will be a covenant not to execute. Wendell Bennett has done research, cases say State Farm responsible to post supersedeas bond to insurance limits," and then reference me to a case from 1918 in New York State. And then I, at the bottom paragraph, "If they have offered a deal then this does not become critical. He --" referring back to the bond. "He invites us to join in the bond in the event that something isn't worked out." In other words, Curtis to pledge assets. "They have made no final decision." And then I have, again it's a little post-it on there that I would have left for Brent Hoggan saying, "We should probably talk on this."

Q What does the number down there mean?

A That's our file number, I think. I'm not sure, because -- I don't know.

Q As far as you know, does that have any significance?

A No.

MR. CHRISTENSEN: While that's being marked, I'll state for the record that 109-P, which was the handwritten statement of assets and income, has now been [26] marked, and I offer that.

MR. SCHULTZ: No objection, Your Honor.

THE COURT: It's received.

(WHEREUPON Exhibit Number 109 was received into evidence.)

MR. CHRISTENSEN: And the document that's on the screen has now been marked as Exhibit 110-P, and we offer that.

MR. SCHULTZ: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 110 was received into evidence.)

Q (BY MR. CHRISTENSEN) Let me go back and explore this with you. Did you understand -- And by the way, was this a telephone conversation you had with Mr. Bennett?

A Yes.

Q In that conversation did you repeat Mr. Campbell's need for a supersedeas bond to be posted in the whole amount?

A Yes.

Q And was Mr. Bennett still acting as Mr. Campbell's attorney?

A He was. Or supposed to -- He was supposed to be.

[27] Q Was he acting in Campbell's best interest when he conveyed this position with respect to the supersedeas bond?

A He was taking care of State Farm.

Q Does that 1918 case from New York necessarily mean that in Utah in 1983 State Farm didn't need to be posting a bond?

A No.

Q In this conversation did he encourage you, on behalf of Mr. Campbell, to try to strike a deal with Ospital and Slusher?

A He did.

Q And did he tell you why?

A So State Farm wouldn't have to post -- I don't know that he said it in so many words, but the clear implication was so that there would be no issue or problem with Curtis having to try and come up with the rest of the money to post the bond.

Q Did you understand State Farm was trying to avoid having to post it themselves on Curtis Campbell's exposure of $135,000?

A Correct.

Q Now, at the bottom it said they have not made a final decision yesterday on a bond. This was December 1st?

[28] A That is correct.

Q Were judgments now in place against Mr. Campbell?

A They were.

Q Did State Farm ever post a supersedeas bond, as far as you're aware?

A Not as far -- Not that I'm aware.

Q Now, did Mr. Bennett tell you that if a deal couldn't be made with Slusher and Ospital, that Mr. Campbell would be on his own for the $135,000?

A I think that was the clear implication. It wasn't an absolute closed door, but that was certainly the nature of that conversation, as well as the correspondence.

Q Now, Mr. Jensen, there's been suggestion in this case that this was really no big deal for Mr. Campbell during this time frame, he really didn't have anything to worry about. Is that accurate?

A When -- I had known Curtis Campbell for a long time. In my experience Curtis was a very measured, very precise, very conservative individual. He was in his sixties when all of this happened. He had been very frugal, from what I had seen, he didn't have a lot of resources, and when he tells someone of that personality, who's spent a lifetime trying to get what [29] they do have, it may all be out the window, that's pretty tough.

Q I'm going to put on the screen another document from your file. Is that your handwriting?

A Everything except the file number at the bottom.

Q Is that dated December 5th?

A Yes, of 1983.

Q And I believe that's the same date as the call from Mr. Bennett. No, I'm wrong. It was December 1st, wasn't it? So this would have been four days later. Would you read that note, please.

A It would have been a telephone call with Scott Barrett, "There is no problem with executing right now, but needs to know now and have some assurance of supersedeas, that if a supersedeas bond will be posted on the appeal, otherwise they will act and execute on Curtis' assets."

Q Who was Mr. Barrett?

A He was the attorney for Mr. Slusher.

Q As an attorney, was it your obligation to convey this kind of information to Mr. Campbell?

A Yes.

Q Did you do that?

A I did.

[30] MR. CHRISTENSEN: This has been marked as Exhibit 111, and we'd move the admission of 111.

MR. SCHULTZ: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 111 was received into evidence.)

Q (BY MR. CHRISTENSEN) Here's a letter, I think the jury's already seen. After Mr. Bennett and you had spoken on the phone, and we saw your note of that, and he'd indicated the 1918 New York case, and the position on the bond, did you have some concerns about the position that State Farm was taking on this bond?

A Yes, in terms of protecting the Campbells, very much so.

Q Was this letter written as an effort to make a formal demand on those concerns?

A Yes, it was saying, basically, "Stop the bleeding. Get this thing put to bed."

Q Okay. Would you read the first paragraph for us, please.

A "Pursuant to our conversation on Friday, December 2, 1983, in the above-captioned matter, I would simply reduce to writing what I indicated to you. Formal demand is hereby made that as State Farm pursues the appeal process, State Farm also post a supersedeas [31] bond in the matter, so as to protect Mr. Campbell's assets and position in the case.

"We feel there is -- "

Q Go ahead and read the second paragraph, please.

A "We feel there is no doubt, under the circumstances, that there is substantial exposure on the part of State Farm because of the handling of this matter, and furthermore, if the sheriff were to execute upon assets of Mr. Campbell, we believe this would simply further evidence the bad faith of State Farm. If execution on assets occurred, we would then be forced to make demand for substantial punitive damages.

"We have also been contacted by Scott Barrett, and he indicates that they plan on taking action, execution, unless there is some assurance very shortly that if an appeal is taken, a bond will be posted for the full amount.

"Please advise in the near future as to your position on the matter."

Q Okay, let me back up. Much of this has been discussed and is self-explanatory. I want to point to the section on "further evidence of bad faith."

MR. SCHULTZ: Your Honor, I object.

MR. CHRISTENSEN: I haven't asked the [32] question yet.

MR. SCHULTZ: I'm sorry, go ahead.

Q (BY MR. CHRISTENSEN) Although Mr. Hoggan signed the letter, and apparently he also dictated this one. Were you involved in the preparation of this letter?

A Yes, I would have reviewed it before it went out, and would have made a modification of adding the last sentence in the second full paragraph.

Q What I want to discuss with you is the reference to a demand for substantial punitive damages if Mr. Campbell has his assets executed on. Was the message that you were trying to convey with this letter was Mr. Campbell would only hold State Farm accountable if he lost his home?

MR. SCHULTZ: Object, the letter speaks for itself.

THE COURT: I'll sustain the objection, it's also leading.

Q (BY MR. CHRISTENSEN) Would you explain the reference to punitive damages, please.

A The situation was already very bad and very difficult for Mr. Campbell. This was trying to impress on State Farm, "Do something now. Don't let it get worse."

[33] Q After this demand did State Farm agree to post a supersedeas bond?

A Not for Mr. Campbell's exposure.

Q If State Farm had been intending to pay the judgments if they were sustained on appeal, was there any reason why they should not have been willing to post a supersedeas bond for the whole $184,943?

A No.

MR. SCHULTZ: Object, leading.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) What did State Farm's refusal to agree to post a supersedeas bond to protect Mr. Campbell's full exposure indicate to you as a lawyer with respect to their intent to pay judgments if the judgments were sustained on appeal?

MR. SCHULTZ: Object, calls for the witness to speculate.

MR. CHRISTENSEN: I'm asking him what it told him about their intent.

THE COURT: Overruled.

THE WITNESS: It simply said that State Farm would be covering State Farm, but Mr. Campbell would not - - They were not willing to step up to the plate and cover the risk and exposure he had at that point.

* * *

[35] * * *

Q Okay. So there -- And you're right. There was an offer from State Farm by this time to Ospitals and Slusher that if they'd each take $25,000 and forget the rest of their judgments, that State Farm would pay?

A That is right.

Q And it is your understanding that those offers were rejected by Ospitals and Slushers at that [36] time?

A Yes.

* * *

[39] * * *

Q (BY MR. CHRISTENSEN) All right, I'm going to show you another document from your file. It's a December 7th, 1983 letter from Mr. Humpherys to you.

A Yes.

Q What's the handwriting up in the upper right-hand corner?

A That would be, again, a post-it note that I probably put on the original of the letter in our file, [40] and then that's my handwriting that I would have then given the letter to Brent Hoggan, or just set it on his desk, and then he would have returned it to me with just his writing at the lower right-hand corner of the post-it note, "Let's talk."

Q Would you read the letter for us, please.

A "I have been advised by Scott Barrett that you are representing the Campbells personally, as it relates to their excess exposure. I have sent you a copy of the various correspondence I have had with Wendell Bennett to keep you advised of the situation.

"Because of State Farm's unwillingness to even tender the limits of their policy toward the judgment, the Ospitals are forced to consider collection of the judgment. Though it is not their desire to go personally against the Campbells, we are left no alternative because of State Farm's position.

"We would like to commence with supplemental proceedings unless you desire to propose some type of settlement on the judgment. The Ospitals may be amenable to considering an assignment of Campbell's rights against State Farm in turn for a covenant not to execute personally against the Campbells. We would be willing to consider another proposal, should you have another alternative, but in any event, it is necessary [41] that we proceed expeditiously.

"I would appreciate your prompt response."

Q As far as you're aware, was this the first communication from Mr. Humpherys suggesting there may be a way to work out an agreement?

A Yes.

Q The third paragraph refers to, "We would like to commence with supplemental proceedings." Would you explain to the jury what those are?

A That is where a motion is made to the court after there is a judgment, and the judge then signs an order that directs that person that the judgment is against, to come to court, sit in a chair, I guess like this sometimes, sometimes it's less formal, and to answer, and bring all copies of financial records of assets, liabilities, and so forth they may have, and to answer questions under oath as to all of their assets so that a creditor can determine

what assets they may seek to have the sheriff execute on to collect the judgment or the debt.

Q Once the judgment creditor asks questions and finds out what assets the person has, does the creditor then have a choice of what assets to go after?

A So far as permitted by the law, they do.

Q All right, I'm going to move on and show you [42] another letter from your file. Is this a letter that you would have reviewed close to the time frame that it was received?

A Yes. Brent Hoggan would have brought it to me.

Q Move to the third paragraph, please, so that we don't have to read the entire letter. Would you read that?

A "I had hoped that we could have the supersedeas bond question resolved by the time I filed the appeal, however, after I spoke with you the afternoon of the 16th of December, I spoke with Rich Humpherys, who advised me that he had spoken to neither yourself nor Miles concerning working out an arrangement with Mr. Campbell for the protection of his personal assets, and seemed to be of the opinion that maybe Mr. Campbell wasn't interested in talking with the Ospitals and the Slushers concerning this matter, and indicated that he had, accordingly, garnishments against State Farm, and was considering issuing execution on some of Mr. Campbell's personal property.

"I advised him that I had been told by you that efforts were being made to work things out, and assumed that there was merely a miscommunication between the parties, but that either you or Miles would be [43] contacting he and Scott Barrett within the next few days.

"He indicated that he would need to sit down with yourself or Miles, and Mr. Campbell to explore the advisability of giving a covenant not to execute to Mr. Campbell in exchange for the assignment of the proceeds from a bad faith refusal to settle action that Mr. Campbell might have against State Farm, and depending on what he felt the strengths of that action were, that he might be willing to enter into some type of a covenant.

"He indicated that he could not speak for Scott Barrett representing Slusher, but from my observations Scott Barrett seems to be taking Rich Humpherys' lead all the way through this case, and I'm sure that if you can work an arrangement out with Rich Humpherys, that Scott Barrett will agree to it also."

Q Did Mr. Bennett encourage you to work out an arrangement whereby Mr. Campbell would, in essence, agree to give the Ospitals and the Slushers the proceeds of a bad faith case against State Farm as a device to protect his assets?

A Yes.

Q Now, I want to move down to the paragraph that begins, "If an arrangement cannot be worked out." [44] Would you read that, please?

A "If an arrangement cannot be worked out with the Ospitals and Mr. Slusher, then I would suggest that Mr. Campbell and State Farm work together for the posting of a supersedeas bond wherein State Farm will become principal on that part of the bond covering their policy limits, the interest on the part of the judgment that the policy limits cover, and the court costs, and that Mr. Campbell become principal on the balance.

Q All right. Let me refer back to what we've written on the pad, here. Was that another communication indicating what State Farm's intent was with respect to posting a bond on the $50,000 and the $135,000?

A It was.

Q And explain again what that was.

A That State Farm would protect to their policy limits on the $185,000 judgment, Mr. Campbell would have to protect, could only stop execution by presumably posting his home and what other assets he had, to try and prevent that during the appeals process.

Q All right. And let me refer you to this paragraph. Would you read that, please?

A "I do not know what Mr. Campbell's personal worth is, however I am generally aware that he owns some [45] real

property there in Cache County. However, I do not know the value of that property and his other assets."

Q Is that further evidence that State Farm, through Mr. Bennett, was saying, "Curtis Campbell, put up your own assets"?

MR. SCHULTZ: Object, leading, calls for speculation.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Explain what the significance of that paragraph is, please.

A It tells Mr. Campbell, "You're on your own with whatever assets you have."

* * *

Q I'm going to show you another document from your file, and I'll show you the second page of it. Is this a letter you wrote?

A It is.

Q Would you read those two full paragraphs, please.

[46] A "This will confirm my telephone conversation with Rich this date concerning a proposed meeting between the two of you, myself, and Brent Hoggan, along with our client, Curtis Campbell, to review the status of the above-captioned matter. I have indicated that we will have Curtis Campbell in our office and available for any informal questioning which either or both of you may wish to do of him, in view of a possible resolution of Mr. Campbell's exposure in this matter by assigning his cause of action against State Farm to the two of you. I believe this would only be possible if both of you were in agreement on this method of resolving the matter.

"We would like to meet on Friday, January 6th, 1983, at 10:00 a.m. in our office regarding this. This would also confirm my understanding with Rich that he would not, prior to this meeting, take any action of collection as against Mr. Campbell, though this will not preclude him from garnishing Mr. Campbell's insurance policy and proceeds for the same."

Q So did this meeting that's suggested -- Let me finish the letter.

A "If you have any questions, or if this meeting date is not acceptable, please let me know."

Q Did this meeting that's proposed in this [47] letter begin the negotiation process to work out an arrangement between Slusher, Ospital, and Campbell to protect Campbell's assets?

A It did.

Q And I noticed a reference near the bottom of the first page, that Mr. Humpherys had agreed not to take action against Campbell while discussions went on.

A That is true.

Q And that was honored, was it not?

A It was.

Q Ultimately was there an agreement reached in December of 1984?

A That is correct.

Q And the fact that the parties had agreed not to take action to seize Mr. Campbell's property while negotiations were going on, did that completely remove any reason for Mr. Campbell to be worried or concerned?

A I'm sure that it helped, but it certainly didn't solve.

Q Until the agreement was actually signed in December, were the parties free to break off negotiations and proceed to execute on his assets?

A I think they would have had to have given us, as his counsel, some kind of reasonable notice. I don't think they could, or should have been able to just go to [48] the sheriff and have a notice tacked up on his front lawn. But it would probably not have been for very many days. They could have, either one could change their mind.

Q Did Mr. Campbell understand that?

A Yes.

Q Now, there was an agreement reached in December of 1984 --

A That's when the final signatures were placed on it.

Q And over a period of months there were negotiations back and forth?

A There were.

Q Some terms in the agreement were things Mr. Campbell wanted, some terms were things that Slusher and Ospital wanted?

A That is correct.

Q Now, as the agreement was concluded -- and the jury has seen this agreement before -- it was ultimately signed December 6th of '84?

A Correct.

Q This would have been a year and, what, two months after the verdicts?

A Approximately. Well, no, it would be more like a year and three or four months after the verdicts. [49] Maybe a year and one or two months after the judgment was actually entered.

Q Now, was the agreement, as it was ultimately concluded, an assignment of the full cause of action, or did Mr. Campbell retain some interest in it?

A He retained a 10 percent interest in the cause of action, the claim.

* * *

Q During this entire time frame, do you recall anyone from State Farm expressing any concern to you or the Campbells about what was happening to the Campbells [50] personally as a result of State Farm's actions?

A Not at all. I mean there would be some nominal mentions in a letter, but nothing of any significance.

* * *

MR. CHRISTENSEN: I think by stipulation we can have Exhibit 113 received, Your Honor. It's a May 9th, '84 letter from Rich Humpherys to Glenn Hanni.

THE COURT: Is that correct?

MR. SCHULTZ: No objection, Your Honor.

THE COURT: Received.

(WHEREUPON Exhibit Number 113 was received into evidence.)

Q (BY MR. CHRISTENSEN) Now, Mr. Jensen, State Farm has taken the position in this case that there was an agreement in May of 1984 that there did not need to be a supersedeas bond posted. And I believe it's State Farm's position that this letter is the evidence of such an agreement. Let me review that with you, if I could, please. Would you read the first two paragraphs, [51] please.

A "This will confirm the numerous conversations we have had prior to this time, when we have been discussing the State Farm's payment of their limits towards the judgments.

"As I understand State Farm's position, State Farm is unwilling to pay the limit of the policy to the plaintiffs during the pendency of the appeal, unless the plaintiffs would satisfy the judgments for said amount. We have advised continuously that the plaintiffs are not now willing to satisfy the judgments for only the policy limits. Plaintiffs have heretofore made demand for the policy limits to be applied toward the judgments, and State Farm has declined to tender the limits without the conditional satisfaction of the judgment."

Q Okay, now, would you read the first sentence of the next paragraph, please.

A "You have indicated State Farm was desirous of filing a supersedeas bond for the amount of the policy limits and seek a stay of the execution pending the appeal."

Q All right, let me stop you there. What amount was State Farm stating that they would post a supersedeas bond for?

A $50,000.

[52] Q All right, referring back to our chart, is that this amount?

A Correct.

Q Is that consistent with what you've indicated earlier, that they were not indicating a willingness to post a bond for the additional $135,000?

A That is right.

Q All right, would you go on and read further, please.

A "In an effort to resolve this matter, and in order to avoid the additional costs and expense to our clients, I have indicated a willingness to agree not to execute during the appeal if State Farm would confirm in writing that, in the event the judgment was affirmed in an amount in excess of the policy limits, State Farm would forthwith pay its policy limits, plus all court costs determined by the court, together with interest at the rate of 12 percent per annum on the entire amount of the judgment during the pendency of the appeal."

Q Would you read the next part of that sentence?

A "We also had further discussions that this understanding would not prejudice the plaintiffs in any action they seek against State Farm for bad faith or extra contractual damages, and that this settlement was [53] for the sole purpose of avoiding the necessity of a motion to stay execution and posting the supersedeas bond.

"After discussing this on numerous occasions you indicated that State Farm would be willing to so stipulate, and that you would confirm the same in writing. I have not yet received your correspondence confirming this, which is the purpose of this letter."

Q Okay, I think that is enough. You got a copy of this letter?

A I did.

Q Obviously you were very interested in what was going on on the supersedeas bond issue.

A I was.

Q Did this agreement apply to State Farm's part of the equation? To Campbells'? To the full amount? What?

A For the $50,000.

Q For this amount?

A Right. And the interest at the judgment rate on the Campbell portion, but not on the principal.

Q What about this, the $135,000?

A I think that is still exposed.

Q Did you have an understanding as to why Ospitals were willing to agree with State Farm that they [54] didn't need to post the supersedeas bond at this point in time, but Ospitals did not express a similar willingness to the Campbells?

A I suspect simply because of the relative size. I assume State Farm is a very large company and Campbell is an individual and assets could be tried to disappear in a hurry sometimes. So that in terms of collectability, State Farm was much easier, I assume, to figure they would be there through the appeals process than Campbells' assets.

Q Would it be fair to characterize this as an agreement in May that there needed to be no supersedeas bond for the $135,000?

MR. SCHULTZ: Object, leading.

THE WITNESS: No.

THE COURT: I'm going to overrule that. You can answer that question.

Q (BY MR. CHRISTENSEN) This was Ospitals' attorneys writing this letter; is that correct?

A That is true.

Q And Ospitals actually only had part of these rights.

A They had the smaller portion.

Q Okay, let me move on, here. Here is another letter from your file. Is this from Ospital's attorney?

[55] A No, this is from Slusher's attorney.

Q Excuse me. Could we have you review this with us, please. Would you read the first paragraph?

A "As you know, we have made no attempt to collect the existing judgment against Mr. Campbell, although no supersedeas bond has been filed. We have more or less decided that since the judgments bear interest at 12 percent we will not pursue any garnishment against State Farm for the policy limits pending the appeal.

"Mr. Humpherys and myself have been in contact concerning possible arrangements that may be made to pursue a bad faith action against State Farm for refusal to settle within the policy limits. We hope to get together to finalize some proposals to be made to Mr. Campbell within the near future, but Mr. Humpherys has been busy and thus far we have been unable to get together and reach an agreement among ourselves.

"In the meantime, you may be assured that no effort to levy execution on Mr. Campbell's property will be made until after it becomes apparent, if it does, that no agreement is possible as to a covenant not to sue or an assignment concerning the bad faith claims against State Farm Insurance."

* * *

[57] * * *

Q Until the December 6th, '84 agreement, was there an agreement that there need be no supersedeas bond posted for the $135,000 of the judgments?

A No.

* * *

Q (BY MR. CHRISTENSEN) Now, Mr. Jensen, after the December, '84 agreement, where Mr. Campbell, Ospitals and Slushers essentially agree on the bad faith [58] case to work together, Mr. Humpherys and Mr. Barrett became legal counsel for Slusher, Ospital, and Campbells for the bad faith case only; is that correct?

A Correct.

Q Now, there was an appeal pending by that time; is that true?

A That is true.

Q And this was the appeal of the judgments against Mr. Campbell that Ospitals and Slushers had?

A Right.

Q Was there an arrangement worked out, while Mr. Humpherys was representing the Campbells in opposing the appeal, and Mr. Bennett was representing the Campbells in pursuing the appeal, was there an arrangement worked out for you to act as a go-between in the communications between Mr. Humpherys and the Campbells?

A Yes. Typically any correspondence or communications would come through my office.

Q And why was that?

A That was because I continued to be the Campbells' attorney, and there was this, the appeal was pending. And so it was important that they stay at an arm's length, I think, for that period of time.

Q Was there still, with respect to the appeal, [59] a conflict of interest between Ospitals, Slusher, and Campbell?

A Yes.

Q Was that the device that was worked out to deal with that, that you would be the go-between?

A Correct.

* * *

[60] * * *

Q Now, looking back, it's easy to say that this time period that we've just discussed shouldn't have been any real concern to the Campbells because they didn't lose their home, or their assets. Would it be accurate for the jury to have the impression that this was no big deal back in late 1983 and in 1984 for the Campbells?

A When you think -- When a person believes that everything's under control, everything is fine, there's no problem, don't worry, and then suddenly you're blind sighted, and suddenly everything that you've worked a lifetime to put together is on the line, that's not a minor thing. That's pretty devastating.

* * *

[62] * * *

MR HUMPHERYS: That is correct, isn't it?

MR. SCHULTZ: Yeah, we stipulate that it is their file, Your Honor, we don't dispute that.

THE COURT: Thank you, Mr. Schultz. Mr. Jensen?

CROSS EXAMINATION BY MR. SCHULTZ:

Q Mr. Jensen, you testified that the first time you had a meeting with Mr. Campbell with respect to this [63] issue that's here in this case was on September 22nd of 1983; is that right?

A That's correct.

Q Okay. And you testified that Mr. Campbell told you that right after the verdict -- Now, this would have been, what, two days after the verdict was entered; is that correct?

A That's true.

Q That right after the verdict -- Or that Mr. Campbell told you, during your meeting, that right after this verdict was entered, that Mr. Bennett had said to him, or that Mr. Campbell had asked Mr. Bennett, "What should I do?" And Mr. Bennett said, "Well, you'd better put a for sale sign on your property." Is that right?

A Correct.

Q Do you recall, Mr. Jensen, that your deposition was taken in this case in 1990?

A I do.

Q Or excuse me, June 24th, 1993? Do you recall that?

A Correct.

Q And that was up at your office, I believe, was it not?

A Yeah, it was.

[64] Q And you were placed under oath when that deposition was taken?

A I was.

Q And do you recall --

MR. SCHULTZ: Your Honor, I would move to publish the deposition of Mr. Jensen. I don't have the original, but I do have a copy, and have asked if we could use that in lieu of the original.

THE COURT: Any objection to that, counsel?

MR. CHRISTENSEN: No objection.

THE COURT: Motion to publish a copy is accepted.

Q (BY MR. SCHULTZ) Let me refer you, Mr. Jensen, to page 20 of your deposition transcript, starting at line 23. I'll read the question, and then I'd like to ask you to read your answer that goes over to page 21.

"Did he relate to you what conversations, if any, he had had with Wendell Bennett immediately following the jury verdict?" And your answer is?

A "He may have, I don't have a specific recollection. But something had caused him a lot of anxiety in terms of his property. Whether it was just the judgment and the jury result, I don't know."

Q So when you were asked that question in your [65] deposition, you said you didn't have any recollection of what Mr. Campbell may have said to you about what Mr. Bennett said after the verdict was entered; isn't that true?

A I said I didn't have a specific recollection of what had caused some of the anxiety.

Q That's true. And you didn't say anything, when you were asked under oath in this deposition, about Mr. Campbell telling you that Mr. Bennett had said, "You'd better put a for sale sign up on your property," did you?

A I did not.

Q Has somebody brought that to your attention recently, Mr. Jensen?

A No.

Q Your memory just got better over the last year or so, or three years?

A My memory didn't get better, but my review of the file was considerably better, so that I'm much more conversant with the case now than I was then, frankly.

Q And isn't it a fact that you don't have any notes from that meeting with Mr. Campbell on September 22nd that indicates that Mr. Bennett said to Mr. Campbell, "You'd better put a for sale sign on your property"?

[66] A That is correct.

Q Did you ever call Mr. Bennett and say, "That was kind of a lousy thing to say to Mr. Campbell right after the verdict came in," Mr. Jensen?

A I think Mr. Bennett knew that.

Q Would you answer my question, please?

A Surely. No.

Q Did you ever call Mr. Bennett and tell him that that was a lousy thing to say?

A No.

Q In any of your conversations or letters with Mr. Bennett after September 22nd, 1983, did Mr. Bennett ever say to you, "Mr. Jensen, I would recommend that you tell Mr. Campbell to put a for sale sign on his property"?

A No, he didn't.

Q By the way, Mr. Jensen, when you give a deposition, you have the opportunity to review it, don't you, after the transcript is made?

A That's correct.

Q And you have an opportunity to make any changes or corrections to anything that may not be accurate; isn't that true?

A That is true.

Q Did you make any corrections to that answer [67] that you read to the jury when you reviewed your deposition?

A I probably didn't review that deposition, I would guess, for at least several years, and so it's never even been signed. That's why you don't have the original.

Q But the answer is, you never made any change to it, did you?

A I did not.

Q And you understand the rules of civil procedure in the state of Utah give a witness thirty days from the time he gets the copy to review and make any changes, correct?

A I do.

Q And you didn't do that, did you?

A I did not.

Q And when you gave that deposition you were sworn to tell the truth, weren't you?

A Just as you asked me a few minutes ago, I still was now.

Q And you were telling the truth when you gave that deposition, weren't you?

A I was to the best of my recollection.

Q Now, Mr. Jensen, I want to talk to you for a minute about this letter of September 29th. Can you see [68] that?

A Some. I can't read it very well from here.

Q Okay, let me turn it around a little more. Or let me put it back here. I'm trying not to block the judge completely.

THE COURT: I've been blocked several times, Mr. Schultz.

Q (BY MR. SCHULTZ) Maybe you're going to have to come down, if you don't mind. What I want to ask you about is, did I understand correctly, Mr. Jensen, that although this letter is signed by Mr. Hoggan, you probably prepared it?

A Correct.

Q All right. And this is about a week after your first visit with Mr. Campbell.

A That is right.

Q Let me refer you down here to this fourth paragraph of page 1 of the letter. That's where you're telling Mr. Bennett -- And by the way, you were writing this to Mr. Bennett to put State Farm on notice of your position; is that correct?

A That is right.

Q And you were acting for and on behalf of Mr. Campbell?

A I was.

[69] Q And you say down here that, "Mr. Campbell considers it the duty of State Farm Insurance Company to take all steps which can be taken to set aside the judgment, to attempt to have the matter retried if there are facts and a basis upon which to do so." Correct?

A Correct.

Q That was something you wanted State Farm to do on behalf of Mr. Campbell.

A That is correct.

Q Okay. Now, just procedurally, Mr. Jensen, what you are talking about there is going back into court, Mr. Bennett going back into court, filing some kind of a paper, or what we might call a motion, with the judge up in Logan, and asking the judge to undo what the jury had done, essentially.

A Correct.

Q And I'm assuming that you wouldn't have said this to Mr. Bennett if you didn't have the authority from Mr. Campbell to make that demand.

A Correct.

Q And so if that was done by State Farm, and if the judge granted the motion to set aside the verdict, then the result would be that the case would essentially revert back to the state it was in before trial, correct?

[70] A Depending on what the judge ruled.

Q Yeah, but --

A He could just reduce damages, he could have, I suppose, increased damages if there was a counter motion for

that. He could have said, "Retry this," or there are any number of possibilities.

Q Okay, well, let me ask it this way. If he did what you had asked, to set aside the judgment and retry the case, then it would have been back in the state it was in before trial.

A The case would have been. Mr. Campbell wouldn't have been.

Q Well, I didn't ask about Mr. Campbell. I asked, would the case have been in the same state it was in before trial?

A Okay.

Q Is that true?

A Uh-huh, that's correct.

Q Now, procedurally, also, Mr. Jensen, you understood that at this point in time there had not been an actual judgment signed and entered by Judge Christofferson up in Logan.

A That is right.

Q And so at the point in time that you sent this letter, there wasn't a judgment upon which the [71] Ospitals or Mr. Slusher could take any, could use to take any of Mr. Campbell's property; is that true?

A Not at that very moment.

Q Yeah, at that point. And if the case had been, the verdicts had been set aside and the court had ordered a new trial, then there never would have been a judgment entered at that time upon which the Ospitals or Slushers could have relied to take Mr. Campbell's property.

A No, that's not necessarily true. The judge could have entered the judgment and he could have still made post-trial motions.

Q Okay. And then it would have been set aside, right?

A If that's what the judge determined.

Q Whether the verdict or the judgments later were set aside, and the court ordered a new trial, assuming the new trial had been ordered, there would not have been anything upon which Mr. Slusher or the Ospitals could have relied to take Mr. Campbell's property at that point. Correct?

A If everything was set aside that had been done?

Q Yes.

A That is right.

[72] Q Okay. Now, based on your letter, here, you're indicating that Mr. Campbell would like to have the verdict, or judgments, as it may be, set aside and have the matter retried, if that could be done, correct?

A That was one of the options that were available.

Q Right. And that was something that Mr. Campbell told you he wanted you to demand that State Farm try to do, right?

A No, I don't think so. I think those would have been largely legal judgments. I don't think Mr. Campbell understood --

Q Well, you were authorized to do this by Mr. Campbell, weren't you?

A I was.

Q Okay. And so your demand that the case be retried, if there was a basis for doing that, was made with authority, correct?

A It was.

Q And it was made after Mr. Campbell had sat through the entire trial and heard all the evidence, correct?

A It was.

Q Now, can you request a trial judge to set aside a judgment after you've filed an appeal?

[73] A I don't think so. I think it loses jurisdiction.

Q So there's a certain order that these things have to be done, correct?

A Correct.

Q And the first step that you have to take, that State Farm and Mr. Bennett would have to have taken to follow the instructions in paragraph 4 of your letter would have been to make this request to the trial judge, that the judgments be set aside, and ask for a new trial. That would be the first step, correct?

A No. Are you speaking just strictly in terms of the case? The first step would be to tell Mr. Campbell, "We will take care of this." They never did that.

Q I fully understand what your position on this case is, Mr. Jensen. But I'm trying to ask you about what was in the letter, and what you were demanding State Farm do, okay? Fair enough? Can you follow me?

A (No audible answer.)

Q What I'm asking you is, you can't take this appeal, which is the second step you've demanded State Farm to do, until you've first done the first step.

A Correct.

Q Correct? So procedurally, the first thing, [74] State Farm had to do was go to the trial judge and ask for that to be set aside, right?

A You're speaking just in terms of what you would file with the court; is that right?

Q And what you asked State Farm to do, right here.

A I don't know that that would be the first thing I asked State Farm to do. The first thing I asked State Farm to do was pay the judgment.

Q Well, Mr. -- Let me ask you this, Mr. Jensen. If State Farm had paid the judgments right then, if that's what you wanted them to do, then why did you ask them to try and get the judgments set aside?

A Because we wanted them to do anything and everything that was legally possible to protect Curtis Campbell.

Q And you specifically asked them to go back into court, didn't you?

A We did.

Q Okay. And after you go to the trial judge to do that, then the next thing you said was, "And further, that it remains the responsibility, now that Mr. Campbell's defense has been undertaken by State Farm, to pursue any avenues of appeal which

may reasonably be made under the circumstances." So you [75] wanted State Farm to take an appeal of the judgments, correct?

A Yes.

Q And you made it clear that you felt that was solely State Farm's responsibility, correct?

A Correct.

Q Then we go over here, and get down here and you say, "If, for any reason, State Farm fails to fully follow through on the matter to its conclusion, and if an ultimate decision is adverse, to pay the same in full, we would look to State Farm Insurance Company, not only for payment in full of the judgment, but for substantial punitive damages."

A Correct.

Q Now, when you said, Mr. Jensen, "If, for any reason State Farm fails to fully follow through on the matter to its conclusion, and if an ultimate decision is adverse," you were talking about taking it all the way through the trial court, and then the appeal court, weren't you?

A That was an aspect of it. Not the whole thing, though.

Q Well, what -- Isn't it if an ultimate decision is adverse, doesn't that refer to taking an appeal, Mr. Jensen?

[76] A It does.

Q Okay. And weren't you telling State Farm that if they failed to fully follow through on the matter to its conclusion, including an appeal --

A Right.

Q -- that you would then look to State Farm for the full judgment and substantial punitive damages?

A Uh-huh. That is correct, including the payment of the judgment.

Q Right. And didn't you tell State Farm that if the ultimate decision is adverse, then you expected State Farm to pay the judgments in full, didn't you?

A We expected them to take care of the judgments immediately, and I think that's what was communicating, and I think Mr. Bennett understood it, from his letters.

Q So you think that you were communicating to State Farm that they should take an appeal, but pay the judgments before the appeal was concluded?

A I think that was an option, surely. I mean here -- May I just clarify my answer?

Q I think you've answered it, Mr. Jensen.

A Okay, I'm sorry.

MR. CHRISTENSEN: Your Honor, I think the witness ought to be allowed to clarify the answer. He's [77] asked -- He's been asked what Mr. Campbell through him was asking State Farm to do, and if that needs clarification I think he should be allowed to give it.

THE COURT: You may clarify your answer.

THE WITNESS: The whole purpose for this letter was to tell State Farm, "When you should have told Mr. Campbell, 'Worry, it's not safe, it's not all right,' you are telling him, 'everything's fine, don't worry about it, I can take care of that.'"

And then when they should have been stepping up to the plate and saying, "Mr. Campbell, this has been tough, and it's rough, and it's miserable, and it's bad, and we're going to see that this is worked out and taken care of," and then when, the very time when they should have said, "We're going to be there," poof.

Q (BY MR. SCHULTZ) Let me go back to my question now, Mr. Jensen. Are you telling State Farm, here, that if the ultimate decision on the appeal is adverse, then you'll expect State Farm to pay the judgments?

A That is one aspect, but no, that's not a fair interpretation of the meaning or intent of that at all.

Q Okay. Now, do you know how long it took for an appeal to be resolved back in the 1980s, Mr. Jensen?

A Several years, often.

[78] Q Okay. And if an appeal lasted several years, you wouldn't know whether there was an adverse decision until the Supreme Court issued it, would you?

A There already was an adverse decision from the jury.

Q Mr. Jensen, would you please not argue with me?

A I'm not trying to, counsel, I'm sorry.

Q You wouldn't know if there was an adverse decision from the appellate court until the appellate court issued its decision?

A But that's not the question I think you asked before.

Q No, it was the question I asked.

A Okay, you're correct.

Q Now, let me ask you this, Mr. Jensen. Did State Farm ask Judge Christofferson to set aside the judgment, the verdicts?

A They did.

Q Did you have a problem with State Farm asking the judge to do that?

A No.

Q Did State Farm appeal the judgments?

A They did.

Q Did you have a problem with State Farm [79] appealing the judgments?

A No.

Q Did State Farm pay the judgments when the Supreme Court affirmed them on appeal?

A The judgments were paid several years later. I don't know exactly, in terms of the time the ultimate appellate decision came down.

Q You haven't been made aware that State Farm paid the judgments within a month after the Supreme Court's decision?

A I'm aware that State Farm paid the judgments. I don't recall exactly the date that they paid the judgments, or the date of the appellate court decision.

Q You were Mr. Campbell's attorney at that time, weren't you?

A I was.

Q Did you tell him that the judgments were paid?

A No.

Q Did Mr. Humpherys tell you that the judgments had been paid in full?

A Not that I recall.

Q Did Mr. Barrett tell you that the judgments had been paid in full?

A No, not that I recall.

[80] Q You were the go-between, between Mr. Humpherys and the Campbells after December, 1984, right?

A Correct.

Q Did you think it might be important to find out the judgments had been paid?

A Yes, I think it is important.

Q But you didn't check on it, apparently?

A No, not at that point in time.

Q And did Mr. Humpherys or Mr. Barrett ever tell you that State Farm promised unconditionally to pay the judgments in full in August, 1986?

A Not that I recall.

Q So you didn't pass that along to Mr. Campbell, either?

A No.

* * *

[81] * * *

Q Okay. And were you aware that there was a settlement agreement reached between Mr. Slusher, the Ospitals, and the Ospitals' insurance company?

A I assumed that there would have been a written agreement.

Q Did you ever see it?

A I don't believe so.

Q Okay. Let me just show you what has been marked, first, as Defendant's Exhibit 69-D. That is a letter from Mr. Barrett to Mr. Humpherys. You've seen that letter before, Mr. Jensen?

A I don't believe so.

Q Do you see in that letter, Mr. Jensen --

MR. CHRISTENSEN: Excuse me, counsel, could I see the letter so I know what you're talking about?

[82] MR. SCHULTZ: Yeah, sure.

Q (BY MR. SCHULTZ) Mr. Jensen, referring to this letter of May 16th, 1983, you see there that Mr. Barrett is confirming that Mr. Slusher has accepted the $65,000 settlement offer from the estate of Todd Ospital?

A Right.

Q Correct? And do you see down there in the second paragraph that Mr. Barrett is confirming that counsel for the Ospitals will prepare the necessary documents to show that they have an agreement, and that would include, if it is necessary, to bring a bad faith action against Mr. Campbell's insurer.

A Correct.

Q That he would prepare that document.

A Correct.

Q So does that indicate to you there was some consideration, in May of 1983, between Mr. Slusher and the Ospitals that down the road somewhere there might be a reason to pursue a bad faith action against State Farm?

A I think bad faith had already occurred.

Q Did you understand my question?

A I think so. I think I answered it.

Q Did that letter indicate to you that Mr., [83] that the Ospitals and Mr. Slusher were talking about agreeing to pursue a bad faith action against State Farm if the claim against Campbell did not settle?

A Correct.

Q Okay. And that was before the trial, correct?

A That's right.

Q Let me show you what's been marked as Defendant's Exhibit 70-D. Have you ever seen that document before?

A I don't recall that I have.

Q This is an agreement dated June 3rd, 1983; is that right?

A Right.

Q Can you tell from the first paragraph who the parties to that agreement are, Mr. Jensen?

A The estate of Todd Paul, and you're going to have to help me, is it Ospital? Ospital?

Q I believe it is Ospital. Is that correct?

A I don't want to keep misstating their name.

MR. HUMPHERYS: It's Ospital.

MR. SCHULTZ: Sorry.

THE WITNESS: It would be between the estate of Todd Paul Ospital and Allstate and Robert Slusher.

Q (BY MR. SCHULTZ) And so the parties were, on [84] the one hand, Robert Slusher, correct?

A Correct.

Q And on the other hand, estate of Todd Paul Ospital and Allstate?

A Correct.

Q And it says that, "Throughout the rest of the agreement Allstate and Ospital will simply be referred to as 'Ospital'"?

A Correct.

Q Is that right?

A Yes.

Q Okay. Now, this is an agreement that sets forth, about half way down, here, the $65,000 settlement amount that's going to be paid?

A Correct.

Q Is that true? Now, if you refer down to paragraph 3 of this agreement, just for a moment, Mr. Jensen, let me just read you part of this, okay? It says, "Ospital and the attorneys currently retained by Ospital shall assist Slusher in the prosecution of," and I'm going to skip a couple of lines and go down to where it says, "including any claim for bad faith against any insurer of the responsible party." Do you see that?

A I do.

Q So that memorializes, I guess you could say, [85] in the form of an agreement, that Ospital and Allstate and Slusher had an agreement that Ospital, Allstate, and their attorneys would assist Slusher in pursuing a bad faith claim if that came to be what happened, correct?

A Correct.

Q All right. And this is, again, before the jury trial in Logan, am I right?

A That's right.

Q Now, go down to paragraph 4, if you would, please. Would you read that paragraph into the record?

A "In the event Slusher is successful in recovering an amount in excess of the amount determined by the jury as the total damages suffered by Slusher as a result of said accident, Slusher shall pay one half of said excess recovery minus court costs and expenses to Ospital. The amount paid to Ospital shall not be reduced by attorneys fees. In determining whether Slusher has recovered the full amount of his damages, the amount of Slusher's recovery shall include the payment herein, any amounts received by Slusher from any insurance carrier for no-fault benefits as provided by Utah no-fault law, and any amount recovered from Campbell or his insurer. The excess recovery of which Ospital is entitled to one half, shall include any damages, including general and punitive damages, [86] recovered in a bad faith claim or action against any insurer."

Q Thank you. So this agreement provided that if there was a bad faith action somewhere down the road, which Ospital and Allstate were obligated to assist Slusher in prosecuting, and if there was recovery above what Slusher receives from the lawsuit in Logan, and certain other benefits from no-fault and so forth, but if there was recovery above that, that Slusher would give Ospital a half, correct?

A I believe that's generally the tenor, the conditions stated in here.

Q Now, at the time that you were providing counsel for Mr. Campbell after the judgment was entered, or after the verdict, and thereon, no one was told about this agreement, I take it?

A I knew that Ospital and Slusher had settled with Allstate.

Q Right. But you didn't know about this agreement regarding a bad faith claim --

A No. I did not.

Q -- potentially against State Farm, did you?

A I did not.

Q Now, Mr. Jensen, in your working with Mr. Campbell back in '83 and into '84, what you were [87] concerned about, as I understand it, was that Mr. Campbell was potentially at risk of losing his property, correct?

A That was an aspect, yes.

Q And that that was the thing that was concerning him, correct?

A That was one of the things concerning him.

Q And that was a pretty major thing, wasn't it?

A Well, there are a number of significant ones, and that was certainly one. That was pretty critical.

Q And one of your concerns, or at least one of the ways you tried to handle that concern, as I understand it, was to see if some kind of an arrangement could be reached with Slusher and Ospital to take an assignment from Mr. Campbell of his claim against State Farm, correct?

A When State Farm did not respond the way we had hoped, yes, that's correct.

Q Okay. And you felt that -- Well, let me ask you this. Was it clear to you, Mr. Jensen, in advising Mr. Campbell that if there was a claim for bad faith in this case, it belonged to Mr. Campbell?

A I couldn't say for a certainty. I don't know whether there may have been some third-party beneficiary claim that Ospitals and Slusher could have brought or [88] not. That's something I've not looked at.

Q Okay. So you didn't even study that at all to see?

A I did not.

Q Okay. Have you ever heard of the Amerman decision from the Utah Supreme Court, Mr. Jensen?

A I have not.

Q Okay. Well, let me just represent to you that, for purposes of my question, that in the Amerman decision --

MR. CHRISTENSEN: Your Honor, I'm going to object to this. I think this has gone beyond the scope of the legal arguments that the court's indicated we can make with witnesses.

THE COURT: Where are you going with this, Mr. Schultz?

MR. SCHULTZ: Your Honor, the witness has testified about what Mr. Campbell's concerns were, and what advice he was giving, and I just want to lay a foundation with him to know what the status of the law was so I can ask him a question about who really had the claim, here, and why that resulted in an assignment, eventually.

MR. CHRISTENSEN: The witness has said he's not familiar with the decision. Counsel now wants to [89] argue the decision. It's meaningless.

MR. SCHULTZ: It also goes, Your Honor, to the issue of circumstantial evidence, of whether there was an actual intent to execute.

THE COURT: All right, I'll allow it. Overruled.

Q (BY MR. SCHULTZ) Mr. Jensen, let me just represent to you, for purposes of my question, that the Utah Supreme Court had held in a decision by the name of Amerman, that a judgment creditor who had obtained a judgment in excess of an insured's policy limit did not have a right of direct action for bad faith against the insured's insurance company. Okay?

A Okay.

Q Accept that as a statement of fact, all right?

A All right.

Q Okay, now, what that means, Mr. Jensen -- Let me ask you if you -- I want to make sure I'm communicating with you. If we applied that principle to this case, that would mean this, that after an excess judgment, a judgment in excess of Mr. Campbell's policy limit was entered and was actually part of the court record, the person who had a right to bring a bad faith claim against Mr., or against State Farm, was [90] Mr. Campbell. Do you understand that?

A I do.

Q Okay. And that Mr. Slusher and the Ospitals did not have such a right. Do you understand that?

A Not directly, right.

Q Yeah, they couldn't have a direct right. Now, let me represent to you also, though, that one way that the Amerman case said Slusher or Ospitals could obtain some kind of an interest in a bad faith --

MR. CHRISTENSEN: Your Honor, I'm going to object to this again. Counsel is basically testifying about the Amerman case, and --

MR. SCHULTZ: I'll withdraw the question, Your Honor.

MR. CHRISTENSEN: I think he also ought to, in fairness, tell him the date of the decision.

MR. SCHULTZ: 1967, I believe, Mr. Christensen. Or '68.

Q (BY MR. SCHULTZ) So it would have been among the body of law you would have had access to in 1981, correct? Or 1983?

A Correct.

Q Now, in light of this rule, that Slusher and the Ospitals could not bring a direct claim against State Farm for bad faith after an excess judgment had [91] been entered against Mr. Campbell, Mr. Jensen, isn't it true that, for the June, 1983 agreement between Slusher and the Ospitals to pursue a bad faith claim against State Farm, and to share in the proceeds of any bad faith damages, isn't it true, for that agreement to be carried out,

Slusher and the Ospitals were going to have to make some kind of an agreement with Mr. Campbell to get his rights, or the rights, or proceeds of his rights to this claim against State Farm?

A No, I don't think so. That would have been the easiest, clearest, safest route. But what -- See, if you're telling me the decision was in 1967 or 1968, the Utah Supreme Court has gone under extraordinary changes in terms of personnel, the attitude towards case law, and whether it can be changed or structured. And I would think that most attorneys would say if that was a decision based upon whatever the composition of the court was then, and it's at least fifteen or twenty years old, maybe this is the time, given a change of the court and social circumstances, in which the court would change its mind, and it's done that on many issues.

Q So what you're saying is, you would have disregarded a decision of the Utah Supreme Court on this point.

A Not at all. You don't disregard it, but my [92] job as an attorney is to represent a client. And if I think the decision is erroneous or may be subject to change, it would be my duty, in behalf of my client, to assert the claim.

Q Mr. Jensen, let me show you another letter. Now, this is Defendant's Exhibit 114-D. Is that a letter from Mr. Hoggan or your law firm to Mr. Bennett?

A Correct.

Q And that comes a couple of weeks after the September 29th letter?

A It does.

Q And does that letter indicate to Mr. Bennett that you are expecting State Farm to follow through with all the procedures and everything that you've mentioned before in your September 29th letter?

A It does.

Q Do you recall when the judgments were actually entered in this case?

A I think in the range of November 17th to the 20th of 1983.

Q Just for the record, let me show you Plaintiff's Exhibit 1, which is a judgment in favor of Mr. Slusher, dated November 29th, 1983, a judgment in favor of John Ospital, dated, it says September 20, '83, but then there was an amended judgment, December 5, [93] 1983.

A Correct. Maybe what I'm thinking of is the memorandum decision from the judge.

Q Okay. Is it my understanding that during the time between September 22nd, 1983, when you first saw Mr. Campbell, and approximately the first week in December of 1983, you had not had any contact with counsel for the Ospitals or Slusher regarding this matter?

A Once the excess verdict came down, I think the parties -- and we became known as legal counsel -- I think we started getting copied on some correspondence, possibly, between counsel. I don't recall offhand without looking at the file if there was any direct contact. I think the first letter that I recall, or phone communication would have been around December 7th.

Q Now, did Mr. Bennett keep your office informed on what he was doing as far as post-trial motions and filing an appeal?

A He did.

Q Did Mr. Campbell ever file a supersedeas bond?

A He did not.

Q Did Mr. Campbell ever pay anything on the judgments to the Ospitals or Mr. Slusher?

[94] A In terms of money, or otherwise?

Q Did he pay any money towards satisfaction of the judgments out of his own pocket?

A No, I don't think so.

Q Did he ever sell any of his property to try and satisfy those judgments?

A Not that I'm aware of.

Q Did Mr. Slusher or the Ospitals ever obtain a writ of execution to take any of Mr. Campbell's property?

A I don't know whether they did or not. They threatened it a number of times.

Q Don't you think you would have known if they'd have obtained a writ of execution?

A If it was served, certainly I would have. But just obtaining the writ, I would not be normally informed, or have a way of knowing that.

Q Has anyone representing Mr. Slusher or the Ospitals ever told you that they obtained any kind of a writ of execution?

A No.

Q Did Mr. Campbell or Mrs. Campbell ever have to file for bankruptcy because of these judgments?

A No.

Q To your knowledge, does Mr. Campbell have a [95] good reputation in the area where he resides?

A Not nearly as good as it once was before this judgment came down. I mean that was -- $250,000 in Cache valley is a lot of money.

Q And you've taken a poll of the people in Cache valley, I take it, to say that?

A I guess you can try and condescend to me all you want, counsel. No, I haven't, and you know it. I'm just trying to answer your questions as fairly as I can. I'm sorry if I'm not giving the answers you want all the time, I've just got to tell you what I know.

Q Are you finished? Mr. Jensen, you said the statement of assets that you obtained came in on November 29th, 1983?

A Correct.

Q So that was about two months after you'd first seen Mr. Campbell.

A That is correct. We took -- There are notes of his assets from the very first meeting.

Q But the list came two months later?

A That's correct.

Q Now, is it true, Mr. Jensen, that you had a meeting with Mr. Humpherys, Mr. Barrett, Mr. Campbell, yourself, and Mr. Hoggan, on January 6th, 1986?

A We did.

[96] Q And by that time --

A I'm not certain whether Mr. Hoggan was there or not, or for the whole meeting. I would have to refer back to the notes and see if they help.

Q And part of your -- Or you were in charge by then, correct? On this case?

A Well, I pretty much have been in charge from day one on the case, really.

Q Okay. During the course of that meeting, Mr. Jensen, was any discussion, or were any questions asked of Mr. Campbell about his assets by Mr. Ospital or Mr. Slusher?

A I think there may have been. I'm not absolutely certain.

Q Do you recall in your deposition saying that you had no recollection of any discussion about Curtis Campbell's financial assets during that meeting?

A That could be.

Q Do you want me to get it out and show you, or are you willing to accept my representation on that?

A No, I have no problem accepting your representation.

Q Okay. Isn't it true that the main thing that went on at that meeting was discussions about whether or not some kind of an arrangement could be reached between [97] Mr. Campbell, the Ospitals, and the Slushers, as far as an agreement to pursue State Farm?

A That was part of the focus of the meeting.

Q Okay. And Mr. Campbell gave some information about his involvement in the case, as well, correct?

A He shared with them his experience.

Q And isn't it true, Mr. Jensen, that Mr. Humpherys represented to you and Mr. Campbell that they wanted to cooperate and try to work with Mr. Campbell on this?

A They did.

Q And near the end of that meeting, isn't it true that Mr. Humpherys and Mr. Barrett proposed a possible agreement as to how this arrangement could be worked out?

A I don't know that they really proposed anything at that point, or at least during most of the meeting, because I think that they were still having to confer with each other, evaluate the facts that Mr. Campbell had shared with them, and then make a decision of whether they were willing to go forward or not.

Q Don't you recall, near the end of the meeting, that a proposal was made that Mr. Campbell would agree to pursue a claim against State Farm, and [98] that, in turn, the proceeds of any damages obtained would be divided between, Mr. Slusher would get 40 percent, the Ospitals would get 40 percent, and Mr. Campbell 20 percent?

A I think that would have been an option that we looked at, at one time.

Q Wasn't that proposed at the January 6th meeting?

A I don't know whether there were specific percentages then or not.

Q Okay. If I represented to you that Mr. Humpherys prepared a memo of that meeting of what was said, and that he indicated that that proposal was made at that meeting, would you have any reason to dispute it?

A No.

Q One of the assets that was identified on the list was a home in Lewiston.

A Correct.

Q Did you indicate that was the home where the Campbells lived back then?

A I believe so, yes.

Q Are you aware whether that home was Mrs. Campbell's home prior to the marriage?

A I think it was.

[99] Q And that she brought that home into the marriage?

A Uh-huh, and I think she subsequently deeded it to the two of them, after Curtis sold some property.

Q Okay. Mr. Hoggan made a comment yesterday in his testimony to the effect that if you had joint owners of property, but one of the joint owners had not contributed anything to that property, and the other joint owner had been the one that, I guess, put all the money into purchasing that property, then the entire property could be taken if the person who had paid the money to obtain it was the one against whom a judgment was obtained. Is that your understanding of how that works?

A No.

Q You were shown a note that you made, Mr. Jensen, Exhibit 111-P, which is a note of a telephone conversation you had with Mr. Barrett.

A Correct.

Q And in that note, if I can just stand here for a moment, you're indicating that Mr. Barrett said, "There is no problem with execution right now, but needs to know now and have some assurance if a supersedeas bond will be posted on appeal. Otherwise they will act and execute on Curtis' assets."

[100] A Correct.

Q Okay, now, did that ever happen?

A Did what ever happen?

Q Did a supersedeas bond ever get posted?

A Not that I'm aware of, no.

Q Did Mr. Barrett, on behalf of Mr. Slusher, ever execute on Mr. Campbell's assets?

A No.

* * *

Q Okay. Let me show you what has previously been marked as Defendant's Exhibit 98-D.

* * *

Q (BY MR. SCHULTZ) Now, let me just ask you this, Mr. Jensen. These letters do show Mr. Hoggan's initials on them, but would you have been drafting them?

A Both of them, or either, or --

[101] Q Well, you were in charge at that point.

A On the December 6th letter from Brent Hoggan to Wendell Bennett, Brent did the initial draft, and I added to that, as I think I mentioned. And then on the December 23rd letter, I believe I would have been the primary draftsman on that.

Q Okay, so you would have been aware of what was in this letter. And in this letter you explain to Mr. Bennett about the January 6th meeting which has been scheduled?

A Correct.

Q And you tell Mr. Bennett, "I believe that we have their assurance," that's Mr. Humpherys' and Mr. Barrett, correct?

A Correct.

Q "Their assurance that there will be no executions until at least that date, when they will have the opportunity to visit with Mr. Campbell and try to assess whether or not a settlement, so far as Mr. Campbell and them is concerned, is possible."

A Correct.

Q Correct? And then the second paragraph says, "Under these circumstances, I believe that we could only make a final determination as to the need of the supersedeas bond after that meeting."

[102] A Correct.

Q "Or as soon as we are able to obtain some type of commitment from them," and so forth. Is that true?

A That's what it says.

Q Okay. And was that letter, you were sending that to Mr. Bennett to give that notice to State Farm, as well, correct?

A Yes. Because he'd been unwilling to post the supersedeas bond to protect Mr. Campbell.

Q And so what the letter was telling Mr. Bennett was, "We have this meeting set up, and until we know what's going to come out of that meeting I can't tell you for sure whether we'll need a supersedeas bond." Correct?

A I think that's the tenor of the letter, yes.

Q Okay. Now, you did get some assurance from Mr. Barrett's partner, Mr. Brady --

A I did.

Q -- on December 23rd, 1983, that there would be no attempt to execute on property pending this meeting? And that's Exhibit 79-D; is that correct?

A That is correct, yes.

Q And you forwarded that on to Mr. Campbell so he knew?

[103] A I believe that I would have, yes.

Q And you also had assurances from Mr. Humpherys at that point that he would not do anything to collect until there was a meeting held.

A I did.

Q Is that right? Did you make that known to Mr. Campbell, as well?

A Yes, I believe so.

Q And then after the January 9th meeting, there was a period of time without a lot of communication, as far as letters go; is that correct? For maybe a month or two there wasn't a lot of communication or correspondence?

MR. HANNI: You said January 9th meeting.

Q (BY MR. SCHULTZ) I'm sorry. After the January 6th, '84 meeting?

A That's correct, there was not nearly as much correspondence at that point.

Q All right. Now, you were shown, you were also shown a letter from Mr. Humpherys which was dated December 7th, and that was addressed to you?

A Correct.

Q I don't have the number right in front of me, but I'll show you a copy of it, all right? Now, in this letter, Mr. Jensen, there is some discussion on [104] Mr. Humpherys' part that there might be some attempt to go after the Campbells' personal assets?

A Correct.

Q Okay. But then, in the last paragraph, he says, "We'd like to commence with supplemental proceedings unless you desire to propose some type of settlement," correct?

A Correct.

Q And then he talks about the Ospitals perhaps wanting to consider some sort of an assignment of Campbell's rights, correct?

A Correct.

Q Now, did supplemental proceedings ever take place?

A No, I don't believe so.

* * *

[105] * * *

Q Okay. In any event, the Ospitals never took any action to execute or garnish anything from Mr. Campbell personally.

A You mean in terms of getting court papers served on him?

Q Right.

A Correct.

Q Or in terms of taking any of his property.

A That's correct.

Q Are you suggesting to this jury, Mr. Jensen, that if State Farm had posted a supersedeas bond, there never would have been a December 6th, 1984 agreement?

A No. I think early -- I think immediately after the verdict, had State Farm really acted in behalf of Mr. Campbell, that Mr. Campbell, there would never have been -- We wouldn't be here today. But when it kept dragging on and the threats were made, it became very, very difficult then.

Q Threats, being threats to take his property, you mean?

A Well, you had the experience of the trial, which was very, very difficult --

Q Let me ask you, my question was, who made threats?

[106] A The creditors.

Q You say threats were made?

A The creditors.

Q You're talking about Ospitals and Slusher, right?

A And State Farm.

Q State Farm was a creditor of Mr. Campbell?

A They weren't a creditor, but they certainly threatened Mr. Campbell. I guess that's the term I would use.

Q And did -- Well, just to make clear, none of those threats of Slusher and Ospital to take Campbell's property were ever carried out, were they?

A No, they were not.

Q You were asked about, or you testified about an offer that State Farm made to settle the entire matter for payment of the $25,000 policy limits to Ospital and to Slusher in the fall of 1983, correct?

A Correct.

Q Now, let me just ask you, hypothetically, Mr. Jensen, if Ospitals and Mr. Slusher had accepted that offer, would their judgments, would the judgments against Mr. Campbell have been satisfied?

A Yes.

Q Okay. Would Mr. Campbell have had any [107] personal exposure left?

A Not at that point, no.

Q And so if that offer had been accepted, it would have protected Mr. Campbell completely.

A Yeah, the likelihood of that was pretty remote. After you go through a six-day trial you don't then back off from a $250,000 judgment. But the offer was made.

Q Yeah.

A Yeah, it's possible.

Q You understood that Mr. Bennett was encouraging you and Mr. Hoggan to get whatever kind of an agreement you could that would protect Mr. Campbell's personal assets?

A That was part of what he was doing.

Q Okay. And did he, in one of his letters, indicate that he understood you would probably be contacted by Mr. Humpherys and/or Mr. Bennett, or Mr. Barrett, to try and make some kind of an assignment, or some kind of deal like that?

A He did.

Q And did you understand that that kind of an assignment would mean that, if that kind of an assignment or agreement was made, that Mr. Slusher and the Ospitals would then be entitled to pursue a claim [108] against State Farm?

A Correct.

Q And Mr. Bennett was specifically encouraging you to try and make that kind of an agreement on behalf of the Campbells, wasn't he?

A Since he was unwilling to post the bond, yes.

Q Was he making that kind of suggestion that you make that agreement, Mr. Jensen?

A Yes.

Q At any time between, let's say about December of 1983, when all the judgments were in place, and December 6th, 1984, when the agreement was signed, had been signed by all parties, did anyone ever indicate to you on behalf of Mr. Slusher or Mr. Ospital that they were going to break off any communications, or discussions with you about making a settlement?

A I don't believe so.

Q Under the terms of the December, 1984 agreement, Mr. Jensen, you've testified that Mr. Campbell retained a 10 percent interest in any proceeds from a bad faith claim.

A Correct.

Q I mean that's generally true, is it not?

A Correct.

Q Now, one of the things that you insisted on [109] putting into that agreement on behalf of Mr. Campbell, as I understand it, at least, was that his responsibility for any costs or expenses or fees involved in pursuing that action would also be limited to 10 percent; is that true?

A That is correct.

Q So under the terms of the agreement, Mr. Campbell is only responsible for 10 percent of costs, expenses, and fees of pursuing this action.

A Correct.

Q At the time the agreement was entered, Mr. Jensen, the excess judgments had not yet been paid; is that true?

A That is correct.

Q So is it true also that those excess judgments were included as part of the formula of how any monies would be disbursed?

A Correct.

Q And so the excess judgments were, in fact, included, and considered to be part of the proposed potential bad faith claim.

A If they had not been paid or satisfied otherwise, yes.

Q Yeah. And so- - And at that point in time, as of December 6th, 1984, was Mr. Humpherys and his [110] firm, and Mr. Barrett and their firm, now counsel for Mr. Campbell with respect to this claim?

A In terms of the bad faith claim, yes.

Q Yes, that's what I meant. And so would you expect them to communicate to Mr. Campbell, or at least to you so you could get it to Mr. Campbell, when those judgments got paid?

A Yes.

Q And would you expect them also to communicate either to Mr. Campbell or to you, so that you could get it to Mr. Campbell,

when State Farm made an unequivocal promise to pay the judgments if the Supreme Court affirmed them on appeal?

A Yes.

* * *

[111] * * *

Q Now, is it correct that the first time you actually received a draft of a proposed agreement was sometime in May of 1984?

A That is right.

Q And then in -- And you sent that on to Mr. Campbell and asked him to review it; is that true?

A I did.

[112] Q And did you then meet with Mr. Campbell and go over the terms, and explain them to him?

A I believe I did in June.

Q And then on about June 18th, you sent a letter to Mr. Humpherys and to Mr. Barrett with some suggested changes that you would like; is that true?

A That is true.

Q And then you didn't hear anything from them for about three months; is that right?

A That is correct.

Q And so by September of 1984, you were wondering what was going on, weren't you?

A I was.

Q And at that point you sent a letter to Mr. Humpherys and Mr. Barrett saying, "I had expected that one of you would incorporate my proposed changes, and that we'd get this thing taken care of," correct?

A Correct.

Q And when did you hear back, then, from Mr. Humpherys or Mr. Barrett in response to your September letter?

A I'd have to refer to the file to remember the date. I think -- I think we corresponded in September, and perhaps I sent them an agreement in September or November, I'd have to look.

[113] Q I think in your September letter -- I'll just represent to you this in the interest of time -- you actually sent them a revised proposed agreement.

A Okay.

Q Because they had not sent one back to you; is that correct?

A Correct.

Q And then I'll just represent to you that the next correspondence that I have seen in your file is an October 31 letter from Mr. Humpherys. Does that sound about right?

A It does.

Q And so to just summarize, you had a meeting in January of 1984, then you got a letter from Mr. Barrett, March 13th of '84, which said, "Rest assured we aren't going to execute, so long as we're discussing the agreement," right?

A For his client, yes.

Q Right. And a copy went to Mr. Humpherys, right?

A Correct.

Q And then you waited until May before you got a proposed agreement, right?

A Correct.

Q Then you sent them back your requested [114] changes in June, and you waited clear until the end of October before you ever heard anything back from them on this, correct?

A No, I think there were at least a few telephone conversations in September or October, where Mr. Humpherys had wanted some other changes incorporated into the agreement.

Q But nothing in writing from him until the end of October.

A That may be correct.

Q Okay. And then when you got the letter back from Mr. Humpherys October 31st, you immediately got the agreement over to Mr. Campbell, correct?

A Correct.

Q And Mr. Campbell actually signed this agreement the first week in November of '84; is that right?

A That is correct.

Q And you sent it back to Mr. Humpherys and Mr. Barrett on November 7th; is that right?

A That sounds correct.

Q And then it wasn't until about a month later that you actually got word back that everybody else had signed.

A Correct.

* * *

[116] * * *

Q Based on the changes you requested in June, once they were incorporated, was that pretty much the way the agreement was signed?

A It was.

Q Let me show you what's been marked as Exhibit 113-P, Mr. Jensen. This is the letter that Mr. Humpherys sent to Mr. Hanni that you went over.

A Correct.

Q Is that correct? Let me just ask you a couple of questions about the language in this letter.

MR. CHRISTENSEN: Excuse me, counsel, could I see this --

MR. BELNAP: Was there an overhead on that one?

MR. CHRISTENSEN: Could I see it before you get into it?

Q (BY MR. SCHULTZ) Let me hand you the exhibit, Mr. Jensen. Now, referring to the third paragraph of this letter --

A Right.

[117] Q It says, "You have indicated State Farm was desirous of filing a supersedeas bond for the amount of the policy limits and seek a stay of the execution pending the appeal." Now, if State Farm filed a supersedeas bond for the policy limits, that would be the $50,000 policy, right?

A Correct.

Q If State Farm filed a supersedeas bond for that amount, there would not be any need to ask the court to stay execution, would there?

A Not for the $50,000.

Q Okay. So can you explain what that means, where it says, "And seek a stay of the execution pending appeal"? That's kind of legal terminology. What does that mean?

A It sounds like that, to not have, that State Farm may have been willing to not, to request that the court not permit an execution on Mr. Campbell's assets.

Q Right. And just in general, that's something that you can ask a court, to stay, or to stop a certain proceeding; is that correct?

A You can ask, but that would rarely be granted, in my experience.

Q Okay.

A It's just paper work.

[118] Q What I'm asking you, though, Mr. Jensen, is what is it? It's a request --

A It stops --

Q -- to stop any attempt to execute on property, correct?

A Correct.

Q And that is something that Mr. Humpherys is telling Mr. Hanni, or summarizing for Mr. Hanni, that what State Farm was desirous of doing was to bond the $50,000 policy limit, and then ask for a stay of any execution on the remaining amount of the judgment during the time the appeal was going, correct?

A Uh-huh. That's, what, May 9th of '84, so that's seven or eight months after the jury verdicts, and four or five months after the judgment had been docketed.

Q But is that correct, what I had said?

A Correct.

Q And if a request is made to a court to stay execution on any of Mr. Campbell's property for the amount of the judgment above $50,000, and if that request for a stay was granted, could any execution, or any attempt of an execution on his property have been successfully made during the time the appeal was pending?

[119] A Not at that point. But the parties had already agreed they wouldn't execute. It was rather meaningless at that point.

Q Okay. So as of May 9th, 1984, the parties had agreed that they would not execute?

A We had the commitment. They could still change their minds, but I had letters then, at that point in time, from both attorneys, for the Slushers and Ospitals, that they had agreed. And as I indicated earlier, they could change their minds and send me a letter saying, "We're going to execute."

But -- And so I, at that point in time I don't believe they could have executed without giving us notice that they could not come to an agreement, or would not accept the proposals that we had made.

Q Okay. Now, let me go on here with this a little further. The second sentence in the third paragraph says, "In an effort to resolve this matter, and in order to avoid the additional costs and expense to our clients," what would it -- Would it be accurate, Mr. Jensen, that the matter that is being discussed here is State Farm's desire to file a supersedeas bond of $50,000, and then to seek a stay of execution on the rest of the judgment?

A I'm doubtful of that. I think it's probably [120] referring to simply the supersedeas bond, because I think that was the big issue at that point in time with the parties, because some of the parties were financially really strapped.

Q You mean the supersedeas bond on the entire judgment?

A No, on the $50,000. This was never an offer to bond the whole judgment that I was aware of.

Q In any event, Mr. Humpherys says, "In an effort to resolve this matter, and in order to avoid the additional costs and expense to our clients, I have indicated a willingness to agree not to execute during the appeal." Now, does that say that Mr. Humpherys has indicated a willingness to agree not to execute only on State Farm's insurance policy?

A It does not say that. In the context of that sentence I would have read it simply on the $50,000, though.

Q But it doesn't say that, does it?

A It does not.

Q "I have indicated a willingness to agree not to execute during the appeal if State Farm would confirm in writing that in the event the judgment was affirmed in an amount in excess of the policy limits, State Farm would forthwith pay its policy limits, plus all court [121] costs determined by the court, together with interest at the rate of 12 percent per annum on the entire amount of the judgment during the pendency of the appeal."

A Is that a question?

Q No, I haven't gotten to my question yet. I guess I could ask you if I read it right.

A Yes, you did.

Q Okay. "We also have had further discussions that this understanding would not prejudice the plaintiffs in any action they seek against State Farm for bad faith or extra contractual damages, and that this settlement was for the sole purpose of, this settlement was for the sole purpose of avoiding the necessity of a motion to stay execution and posting the supersedeas bond."

Now, does that say that the agreement, or this stipulation that Mr. Humpherys is referring to, does include both the posting of the supersedeas bond and the motion to stay, Mr. Jensen?

A That's the way the last clause reads, but I think it's still, if you look in the context of the whole paragraph, I'm still thinking the issue, as I perceived it from what correspondence I had was,

the fight between the parties was over the supersedeas bond, because State Farm was just unwilling to do more than [122] that.

Q Mr. Jensen, I guess we can all read the English language differently, but the motion to stay execution had to do with the part of the judgment exceeded the policy limit, correct?

A I don't know that for sure. That's one reading of it. The other reading --

Q That's what you said a few minutes ago.

A I know. But as you read the whole paragraph, I'm not sure that it did.

Q Well, there wouldn't be a need for a motion to stay if there was a supersedeas bond.

* * *

Q (BY MR. SHULTZ) Didn't you testify -- Well, I'll go on to something else. Do you know if, Mr. Jensen, do you know if State Farm did agree to the terms set forth in this letter?

A I do not know.

Q Were you ever shown the letter that indicated they did?

A You'd have to refresh my recollection, if there is a letter. I would have to review it.

Q Let me show you, Mr. Jensen, what's been marked as Exhibit 115-D. It's two letters.

[123] MR. SCHULTZ: We'd move to admit that, Your Honor.

MR. CHRISTENSEN: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 115 was received into evidence.)

Q (BY MR. SCHULTZ) Have you ever been shown that letter before?

A I think I have seen this letter.

Q And that is a letter dated May 30th from Mr. Hanni to Mr. Humpherys?

A Correct.

Q And in that letter he references also a letter from State Farm dated May 21st, 1984?

A Correct.

Q Is that the letter that's the second page of Exhibit 115-D?

A I assume so.

Q Okay. And does the May 30 letter from Mr. Hanni to Mr. Humpherys say that, "In the event judgment entered in the above case against Curtis Campbell is affirmed by the Utah Supreme Court and becomes a final judgment, State Farm will pay its policy limits in partial satisfaction of the judgment, together with interest on the entire judgment at the rate [124] provided for law and costs. It is also understood that it will not be necessary for State Farm to post a supersedeas bond." Did I read that correctly?

A Correct.

Q And, if you want to refer to the second page of that exhibit, is that a letter from Jerry Stevenson, addressed to Mr. Humpherys, also affirming that if the Supreme Court affirms the judgments and they become final, that State Farm will pay its policy limits, interest, and costs?

A That's saying they'll pay the $50,000.

Q Okay. Plus interest on the entire judgment, correct?

A Correct.

* * *

[126] * * *

REDIRECT EXAMINATION BY MR. CHRISTENSEN:

Q I want to get back to these letters while they're somewhat fresh in our minds. The letter from Strong and Hanni on behalf of State Farm says, "It's also understood it will not be necessary for State Farm to post a supersedeas bond." Do you see anywhere where that says that Mr. Campbell won't have to post a bond?

A No.

* * *

Q Was it your understanding, back at that time frame, that there had not been a commitment that Campbell didn't have to post the bond for the amount [127] over the policy limits?

A That is correct.

Q The May 9th letter, as you understand it, dealt with the State Farm issue, not the Campbell issue, as far as the bond was concerned?

A Correct.

* * *

[128] * * *

Q Now, let me go back to a question you were asked earlier. Is a stay automatic upon posting of bond, or can a stay only be granted by the court?

A No, the court would have to approve that on a separate motion, I believe.

Q Is posting the bond typically a condition to the judge granting a stay?

A Before you'd ever make the motion you'd typically post the bond, and then ask the judge to say [129] that you cannot execute.

Q Have you ever heard of a situation where the court would grant a stay on a $185,000 judgment for a $50,000 bond?

A No.

Q Are supersedeas bonds generally for more than the judgment?

A Depending on how they are made, they either have to be from very large companies that have good credit ratings, and then they are still somewhat costly if you have to go through a bonding insurance company. And for an individual it usually means plugging substantially in excess of the judgment, or the amount to be bonded.

For instance in this case if you were to say there had to be a $135,000 bond, if a person could not afford the price, or a

bonding company wouldn't give them a bond, then they would have to pledge, usually real estate or securities or other things, considerably in excess of that so the court could be assured, and the creditor, "You will have money there for payment if I grant the stay."

Q Does the bond usually have to be enough to cover interest on the appeal?

A All of the costs of appeal, yes.

[130] Q I will spare the court and the jury going through this September 29th letter one more time, but let me ask you this question. Would it be accurate for this jury to be left with the impression that State Farm did exactly what you requested with this letter?

A Not at all. It would be very, very wrong.

Q This is a letter Mr. Bennett wrote to State Farm within thirty days of receiving that letter. Let me read to you the one sentence, "The letter is rather self-explanatory and is obviously an attempt on the part of Mr. Hoggan to put as much pressure as is possible on State Farm to do whatever is necessary to keep Curtis Campbell from having to in any way respond to the judgment in excess of his policy limits."

State Farm seems to be struggling today to understand your letter of September 29th. Did Mr. Bennett understand it?

MR. SCHULTZ: Your Honor, I object to Mr. Christensen's comments on the evidence.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Does Mr. Bennett accurately convey what you were trying to say with that letter?

A What we were saying was, "It's time to start taking care of Curtis Campbell." That's all we were [131] saying. And they hadn't so far.

Q You were asked if Mr. Humpherys had told you that the judgments were paid in '89. Did State Farm tell you?

A No.

Q Did Mr. Bennett, who was representing Mr. Campbell on the appeal, did he tell you?

A He did not. They did send us the opinion, but they gave us no indication, ever, that they had agreed to pay the judgment. Or when it was paid.

Q Okay. Did you become aware of any indication from Campbell or Slusher during the time from the excess verdicts that you were involved, up to the date of the December 6th, '84 agreement, that Campbell and Slusher did not intend to exercise their full rights under the judgment?

A Just the opposite. You know, I'm not going to -- I'm in no position as an attorney to bluff, to try and say to someone, "Oh, it's just a bluff, so if the sheriff shows up tomorrow, it's just a bluff." I can't play with people's lives that way.

The phone calls, the letters I received, made me very concerned that Mr. Barrett was very forceful, "Hey, executions are coming, I could do it right now. And you've got to have that bond." And then, I got [132] nervous because all I had was his note in my file.

And so I frantically called, and he was out and not available until the end of the year, so I got his partner to sign a letter, fortunately, so that I could at least get through the holiday season with Curtis until we were able to meet to say, "No sheriff until then."

Q Thank you. Now, Mr. Jensen, you were asked to assume that the law did not allow this, and I think that is a correct characterization of the law, that is for Slusher and Ospital to sue State Farm directly. We discussed earlier how creditors can execute on contract rights, those kinds of things.

A Correct.

Q Back in 1983, were you able to rule out in your mind that Slusher and Ospital may have been able to seize that right that Campbell had to go against State Farm?

A To the extent that it was not an asset protected by the exemption statutes, like homestead and so many dollars of furnishings and so forth, I think that that was a real risk.

Q Would the legal device for doing that be a writ of garnishment?

A It would. Possibly an execution. I'm not [133] sure which device.

Q Do you know if the law allowed that or didn't allow it?

A I don't know. It's not something I have researched.

* * *

[134] * * * *

Q (BY MR. CHRISTENSEN) Did you receive some indication through counsel that the parties were struggling with the decision, and weren't sure exactly what they wanted to do with their rights?

A Yes, they didn't like each other.

Q Were Mr. Slusher and the Ospitals being asked to give up the legal right to get some money immediately, and trade that for another lawsuit and claims that they didn't know what they would get out of them, or when?

MR. SCHULTZ: Object, leading.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Explain what Ospital and Slusher were being asked to give up as part of this agreement.

A They had the immediate right to take all steps necessary to collect the full judgment of a [135] hundred and almost ninety thousand dollars. They apparently took steps with State Farm with the garnishment, and they had the right at any time to do that with Campbell.

But when they entered into the agreement with Campbell, they no longer could take and assert those rights to try and collect that $190,000, and it could be delayed -- Well, here we are today.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF CRAIG C. KINGMAN, JUNE 18, 1996

[Vol. 9, R. 10264, commencing at p. 4]

* * *

CRAIG C. KINGMAN called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.

A It's Craig C. Kingman.

[5] Q What is your current employment?

A I'm a divisional claims superintendent with State Farm.

MR. CHRISTENSEN: Your Honor, Mr. Kingman is currently an employee of State Farm, he's also the designated State Farm representative for this trial. May I lead this witness as an adverse witness?

THE COURT: You may.

(BY MR. CHRISTENSEN) Mr. Kingman, is that true, are you the representative of State Farm that has been designated for this case?

A Yes, I am.

* * *

Q You're the divisional claims superintendent over northern Utah and Wyoming?

A Yes, I am.

Q Is that the area from Salt Lake City, north?

A Yes, I have offices in Centerville, Ogden, Logan, and then Wyoming.

[6] Q Are you thirty-eight years of age, coming this July?

A This August.

Q This August? And have you been with State Farm for seventeen years?

A It'll be seventeen years in July, yes.

Q You began in 1979.

A That's correct.

Q In July of '94, which would be about two years ago, you were promoted to the position you now hold of divisional claims superintendent, and were sent to Utah.

A Yes, that's true.

Q And I've forgotten, where did you come from?

A I was a claims superintendent in Ft. Collins, Colorado, before this trip.

Q Was that part of the Mountain States Region?

A Yes, it is.

Q The regional headquarters for Utah, Colorado, and Wyoming are there in Greeley, Colorado, are they not?

A Yes, our regional office is in Greeley, Colorado.

Q So was the regional vice president the same man who's over Utah, that being Mr. Moskalski?

[7] A Yes, Mr. Moskalski is the regional vice president.

Q Now, in your current position, are you over about 105 State Farm employees?

A Yes, that's approximately the number, that's correct.

Q And your current plans are to spend your career with State Farm?

A Yes, I hope to. It's a good company, I enjoy working for them.

Q You currently have some responsibility over the Campbell case; isn't that true?

A Yes, I am supervising the day-to-day activities of the Campbell case.

Q And because it arose out of the northern Utah area, and that's your area, you have some jurisdiction over the case.

A That's correct.

Q Obviously you were not the divisional claims superintendent back in the 1960s when some of these events happened.

A Yes, that's true.

Q Did you take over the Campbell case about a year ago?

A Yeah, about a year ago I assumed [8] responsibility for it.

Q You were present for most of the trial last October, were you not?

A Yes, I was.

Q And we went through the State Farm files, Mr. Bennett's files, on a number of occasions in that trial, did we not?

A Yes, we did.

Q We kind of beat that to death?

A Yes.

Q You've also attended many hearings in this case in preparation for this trial and the prior trial; isn't that true?

A Yes, that's true.

Q State Farm has listed you as a witness in this case?

A Yes, I am.

* * *

[10] * * *

Q Now, do you recall in your deposition last April that I asked you if, based on your knowledge of the Campbell case -- And by the way, that deposition was taken after you'd watched most of the trial last October; isn't that true?

A Yes, that's true.

Q I asked you if, based on your knowledge of the Campbell case, you were aware of anything State Farm had done from 1981, the date of the accident, through '83, the Logan trial, through the appeal, that you thought was

inconsistent with State Farm's practices and policies. Remember that question?

A Sure do.

Q Yeah, I do too. And you said you didn't understand the question; isn't that true?

A Yes.

Q And so I repeated it, and you said you still couldn't answer it, didn't you?

A Yes. I thought what you were asking me was to put myself back into the shoes of the claims superintendent back in 1981, and ask me if I would have [11] done anything differently. And that's a hard thing for me to do.

Q That wasn't the question, was it?

A That was my interpretation of your question.

Q But that wasn't the question.

A No, your question was as you've stated it.

Q And so when you said you couldn't answer it, I explained it; isn't that true?

A Yes.

Q Then your attorney, even though we'd just been going for a few minutes, said she needed to take a break; isn't that true?

A Yes, that's what she said.

Q And I said no, I wasn't going to agree to a break until you answered the question. Do you recall that?

A Yes, I do.

Q And then I asked you for the fourth time. And then the reporter read it to you for a sixth time. Do you recall that?

A Yes, I think that's accurate.

Q Then I told you if I needed to, I'd get the court to order you to answer. Do you recall that?

A Yes, I do.

Q And you started to answer, and your lawyer [12] interrupted. And then the question was read to you for a seventh time; isn't that true?

A I believe that's correct, yes.

Q And you then said you couldn't answer it. And so I asked it to you for the eighth time, and you still said you couldn't answer it, didn't you?

A I believe that's what I responded, yes.

Q Then your attorney said she had to go to the ladies room. Do you recall that?

A I believe she said she needed to take a break, yes.

Q And even though I strongly objected to your leaving without answering the question, you and Ms. Egly left, didn't you?

A Yes, she went to the ladies room.

Q And when you came back, I asked the question for the ninth time.

A I believe that's true. I wasn't keeping track of the number of times, but --

Q I wasn't then, either, but I counted them last night. Then I asked you, and I'm looking at page 30 of your deposition, I asked you, "I want to know if you have seen something, as you've become aware of information about how State Farm handled the Campbell case, have you seen anything that you believe is [13] inconsistent with State Farm's practices and policies?"

And your answer was, "My practice currently is to do the claim committee, get people involved as quickly as possible. For example, when I had the excess verdict that occurred in the Wyoming, and I don't know if that was --"

And I said, "Let me stop you right there. If your answer is yes then I'm going to ask about it. If it's no I'm going to move on. Now which is it?"

And you said, "The answer would be yes."

And that's still your answer, is it not?

A Yes, that's correct.

Q And so your yes answer meant that you had seen something which you believed was inconsistent with State Farm's practices and policies the way the Campbell case was handled; isn't that true?

A Yes.

Q Okay, and I'm going to ask you about that. All right, I'm moving to page 31 of your deposition. I then asked you, after you'd answered yes, "All right, what have you seen?"

Would you read your answer, please.

A "From what I know of the Campbell case, there was a time period involved from when the excess verdict was rendered until there was a payment made. I think [14] presently what we are doing now is paying those. In the one that I have we paid the verdict very quickly.

"But I don't know all of the whys and wherefores to what happened back then. And also, from what I know of the facts of the case, I think, had I been handling the case, I might have made a decision to pay the policy limits, had I been handling that."

Q And I asked you the question, "Before the verdict?" And your answer was what?

A "Yes."

Q And I asked you, "Why is that?" Would you read your answer, please.

A "From what I know of the facts of that case, there was a no contact accident. And I know what happened in Sardine Canyon, so I think, based on what I know of the case, I would have concluded that there was a likelihood of our insured being found somewhat, to some degree responsible for the accident, and would have paid the $25,000."

Q And then I asked you, "And kept the case from ever going to trial?"

And your answer was yes.

A That's correct.

Q You agree, do you not, Mr. Kingman, that State Farm should never have let the Logan trial happen, [15] don't you?

A I think, looking back on all that I know now, I would have paid the, paid our policy limits.

Q And what you know now is taken right out of the State Farm and Wendell Bennett files, isn't it?

A What I know now is based on mainly the attendance at all of the hearings, and the attendance at the first trial, and this trial.

Q Where we presented what happened back in '81 to '83; isn't that true?

A Yes, there was a lot of evidence presented.

Q Now, Mr. Kingman, the Campbell case, as we mentioned earlier, is under your jurisdiction, isn't it?

A Yes, it is now, that's correct.

Q And it was last October when the first part of this case was tried, wasn't it?

A Yes.

Q And you didn't testify last October, did you?

A No, I did not.

Q But you sat here in this courtroom, as someone with authority over this file, and watched State Farm put on witness after witness after witness in that chair, testifying just the opposite of what you said here, didn't you?

A I still believe what I've said there.

[16] Q That's not my question.

A The witnesses that were at trial, I believe that they testified that there was a lot of evidence initially that led to the initial conclusion.

Q Okay. Can you answer my question, please.

A Sure, could you restate it for me, or repeat it?

Q You sat here in this courtroom, as a State Farm representative, last October, with responsibility for the Campbell file, and watched State Farm put on witnesses, including paid experts, to testify just the opposite of what you said under oath a few weeks ago, didn't you?

A I agree with you that I sat through the first trial, and that I watched the evidence presented. But I don't know that there was evidence that was contradictory to what I've said here.

Q Was there a single witness that State Farm produced last October that agreed the Logan case should never have been tried?

A I don't recall what the witnesses concluded last October. I didn't -- I sat in on about 70 percent of that trial, so there was some that I missed.

Q You're telling us today, under oath, you don't know that State Farm took the position that there [17] was not a likelihood of an excess verdict against Mr. Campbell?

Q MR. BELNAP: Not a substantial likelihood, counsel?

Q MR. CHRISTENSEN: Not a substantial likelihood.

Q THE WITNESS: No, I agree with the results of that first trial. There was a substantial likelihood of that excess verdict. And looking back on it, I believe we should have paid the policy limits when we had the opportunity to do so. That was an honest mistake on our part.

Q (BY MR. CHRISTENSEN) You agree with what the jury found last October.

A Yes.

Q It's a no-brainer, isn't it?

A Well, I wouldn't agree that it's a no-brainer.

Q And yet State Farm put the Campbells through thousands and thousands and thousands of dollars of expense, and a ten-day trial to prove that there was a substantial likelihood of an excess verdict against the Campbells, didn't they?

A That was what the jury determined in Phase 1.

Q And you agreed with it.

[18] A I agree that, looking back on it, knowing what I know now, we certainly could have and should have paid our policy limits to resolve that claim.

Q You'll admit that now, because the jury's already found it. You don't have a choice, do you?

A I don't know that I don't have a choice. I formed that opinion.

Q And yet State Farm wouldn't admit it last October, would they?

A State Farm, I think, took a position that they believed Mr. Campbell initially, and handled that claim to the best of their ability at the time.

Q State Farm took the position there was no substantial likelihood of an excess verdict against Mr. Campbell last October, didn't they?

A Yes, they took that position.

Q And they put on many witnesses to support that.

A Yes, they did put on a lot of witnesses.

Q And they didn't put on a single witness who admitted it, did they?

A Not that I recall.

Q Mr. Kingman, did you try to do anything about that? Did you say to anybody at State Farm, "This isn't fair, we ought to take some responsibility, here"?

[19] A What time period? Are you talking about following the trial?

Q During the Campbell trial, prior to the Campbell trial, last October.

A Uh-huh. I looked at the file, attended the hearings, and observed the verdict. And I think, following that verdict, following, believing what that jury told us, that we have some responsibility in not paying those policy limits when we had the opportunity to do so.

Q Are you telling me you couldn't figure that out until the jury told you?

A Well, Mr. Christensen, I wanted to hear all of the evidence. And again, based on all of the testimony that I heard, the conclusion that I felt we should have paid the policy limits, that's the decision that I reached.

Q Could you answer my question? You couldn't figure it out, the jury had to figure it out for you?

MR. BELNAP: Your Honor, it's argumentative.

MR. CHRISTENSEN: I think it's a fair question.

THE COURT: Overruled.

THE WITNESS: I looked at the evidence that was presented, the file material that I had, and I felt [20] that there was a possibility that the jury could determine as they did.

Q (BY MR. CHRISTENSEN) This statement that you made right here, "That there was a likelihood of our insured," that's Mr. Campbell, right?

A Yes, it is.

Q "Being found somewhat, to some degree responsible," and you would have paid the $25,000 and kept the case from ever going to trial, had you reached that conclusion, let's say, one second before the jury's verdict last November?

A As I sat through that trial and I heard the testimony presented, yes, I think I could have, I came to that conclusion during the trial.

Q And yet you heard State Farm take the position just the opposite, didn't you?

A I heard our witnesses testify that the handling of the case back then, at that time, was appropriate. And I don't disagree with that. To go back and put yourself in the shoes of someone that had to make those decisions back in 1983, that didn't have the benefit of all that we've heard, and know all that's happened, that was a tough call. Based on everything I know now, exercising perfect hindsight, it's an easier call.

* * *

[22] * * *

Q Now, Mr. Kingman, it was your testimony under oath, was it not, in your deposition, that in seventeen [23] years at State Farm, State Farm had never emphasized reducing or controlling average pay per claim.

A Yes, that's correct. It's a measure, it's a statistic that we have, but in my experience it's never been emphasized on any type of performance evaluation.

Q Another term that's used for average pay per claim is average paid cost.

A Yes.

Q And in fact, that's the one you're more familiar with?

A Yes, it is.

Q Is another term that refers to this same concept is claim severity?

A Yes, I believe that's a term that means the same thing.

Q And your sworn testimony last April and today is, State Farm does not emphasize that?

A My testimony is that it's an awareness, State Farm has an awareness of those costs, and they need to. But as far as emphasize to the point of being salary consideration or promotional consideration, no, that's not a consideration.

Q Or performance consideration, it's not a consideration.

A No. As I've met with people that I [24] supervise, and have met with people that supervise me, we have not discussed average paid costs in any kind of context related to performance. As I've stated, I think it's more of an awareness.

Q Okay. It's your sworn testimony that you've never seen, in seventeen years, State Farm putting its own interests above the interests of a policy holder.

A No, it's my testimony that, in my experience, and the people that I work with, that we consider the interests of the policy holder utmost, and at least equal to that of the company.

Q You've never seen it otherwise.

A Not to my knowledge, no.

* * *

[27] Q It's your sworn testimony, is it not, that in seventeen years at State Farm you have never seen a claimant receive less than full fair value for their claim. Isn't that true?

A Yes, I am not aware of any situation where State Farm took advantage of anyone in settling their claim.

Q In seventeen years.

A That's correct.

* * *

[28] * * *

Q (BY MR. CHRISTENSEN) Isn't it true, Mr. Kingman, that your sworn testimony has been that in seventeen years, you've never even seen State Farm offer less than full, fair value?

A To respond to your question as a yes or no, Mr. Christensen --

Q Well, is it yes or no?

A -- I would say that I have not seen State Farm offer less than, or pay less than full value of a claim.

Q But you testified, not only had they not paid less, but they'd never even offered less.

A I think it depends on the definition of fair value.

Q And basically the definition is what State Farm chooses it to be, isn't it?

A That's not my definition. I'm here to tell you that I can't, I'm not good enough to put a single dollar figure on the value of someone's claim. And so we evaluate them in a range. And it is our practice to evaluate them within a range, and to make an offer [29] within that range. And I think any point in that range constitutes fair value.

Q Your testimony is that if somebody wrecks their car and goes and gets an estimate at a reputable body shop to fix it for a set amount, you couldn't set a set amount on that claim?

A Well, I think car damage is a lot easier to pinpoint than the injuries people suffer.

Q You've done a lot of those in seventeen years, haven't you?

A Evaluating injury claims?

Q Evaluating damage to cars.

A Yes, I have.

Q It's also your sworn testimony that State Farm doesn't try to save money on claims. They just pay the full amount they owe.

A Yes, it is my testimony, absolutely, that State Farm tries to determine fair value and pay that amount.

Q And you've never seen anyone at State Farm try to gain someone's confidence or trust to get a better settlement.

A That's true. We certainly want to gain the confidence and trust of the people that we work with, but it's not to the effect of attempting to settle a [30] claim for less than it would be worth.

Q State Farm's manuals certainly don't suggest that, do they?

A I'm not sure what manual -- What are you referring to?

Q Well, how about Article 12 of the Claims Superintendent's Manual?

A As I recall, Article 12, it's no longer in use.

Q It's been in use in the seventeen years you've been there, hasn't it?

A No, sir, it hasn't.

Q The Claims Superintendent's Manual, Article 12, has not been in use in the last seventeen years at State Farm?

A I believe the Claims Superintendent's Manual was deleted, or obsoleted in about 1989, 1990.

Q Is that seventeen years ago?

A Well, if you're asking me if it's been in use in the whole seventeen years that I've been with State Farm, no, it hasn't. I haven't used it, we haven't used it since 1989 or '90.

Q But your testimony covered the whole time you'd been at State Farm, did it not?

A Yes, my testimony is my experience with State [31] Farm for as long as I've been there.

Q And it's also your sworn testimony that you have never seen anyone at State Farm take advantage of the fact that someone had an immediate need for money to get a cheaper settlement.

A No, we don't -- It's my experience that we don't do that. We don't look at someone's financial status to determine the value of their claim. Their claim's evaluated based on the injuries and the liability, and the medical expenses, those kinds of things.

Q It's your testimony State Farm doesn't have a tendency to offer more, once somebody gets a lawyer, than they did before?

A My testimony is that we look at an accident, evaluate the liability, look at injuries --

Q Let me stop right here. Again, I think you can give me a yes or no, then if you need to explain you can.

MR. BELNAP: Excuse me, counsel, can I make a statement?

MR. CHRISTENSEN: I guess you're going to.

MR. BELNAP: Well, I don't want to arm wrestle with you, but I'd like to make one.

MR. CHRISTENSEN: I'm glad, because I think [32] I'd lose.

MR. BELNAP: Your Honor, I'd like the witness to be able to answer the question that was put to him, and give him that opportunity.

MR. CHRISTENSEN: I think his answers are not responsive to my questions, and I'm at least entitled to a concrete answer before we get whatever this witness wants to say beyond that.

THE COURT: Well, if you want a yes-or-no answer, why don't you make it clear in the question as you ask it, and then --

MR. CHRISTENSEN: All right, I will do that, Your Honor.

Q (BY MR. CHRISTENSEN) All right, I'd like a yes-or-no answer, Mr. Kingman.

A Okay.

Q Your testimony is that State Farm doesn't have a tendency to offer more, once someone gets an attorney, than they did before they had a lawyer.

A That may be true. I mean it happens sometimes, and it doesn't sometimes.

Q In your deposition you said that was not generally true.

A I think my deposition testimony, I said that we evaluate the claim based on the facts and the [33] injuries, and I don't have one set of evaluations for someone that's not represented, another set of evaluations for someone that is represented by an attorney, and a third set of evaluations for someone, for a case that's going to trial. We evaluate the injuries.

Q Now, as I've said, we evaluate them in a range, and if we make an offer within that range before trial, that's not unusual, and it's usually done in response to a plaintiff attorney that's come down significantly from their last demand.

Q The bottom line is, State Farm has statistics that show they pay more if there's a lawyer involved, don't they?

A If they do, I'm not aware of those statistics.

Q And the bottom line is, State Farm doesn't want people to go get lawyers, do they?

A We tell everyone that they're certainly entitled to get an attorney if they would like to.

Q But you'd rather they didn't.

A There are some cases where I'd prefer that they did, and there are some cases I'd prefer that they didn't.

Q Is it your testimony that State Farm doesn't [34] try to control claimants?

A I'm not sure what you mean by "control."

Q Have you ever heard that word used in training in State Farm, that the State Farm claims representative needs to get control?

A I don't recall that being used.

Q It's also your sworn testimony that in seventeen years you've never written a self-serving letter to a file; isn't that true?

A I believe I testified in my deposition that I've written letters or memos to file that I said objectively stated all of the facts and the evidence that had been presented.

Q But you've never written a self-serving one.

A You define "self-serving" to me in that deposition to be slanted, less than objectionable, or less than objective. And I've never, to my knowledge, written a slanted, or less than objective memo to the file.

Q And you've never seen anybody do it?

A No, I haven't.

Q Let me talk to you briefly about the concept of appearance allowance.

A Okay.

Q Let me give you a hypothetical, because I [35] think this is new to the jury. Let's assume, and I don't have a specific case in mind, this is one I'm pulling kind of out of the air. Let's assume someone's automobile is damaged, and it would cost $2,000 to take it to a repair shop and fix it. It's kind of an old car, and the State Farm claim representative says to the insured, "This car's kind of old, are you really going to fix it?"

And the owner of the car says, "Well, probably not."

And so the State Farm representative says, "Well, what if I give you a check for 500 bucks for an appearance allowance, and you're not going to fix the car anyway, and we'll just call it good." Is that an example of an appearance allowance?

MR. BELNAP: Your Honor, could we approach the bench for a moment?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

MR. BELNAP: Your Honor, as stated at bench, we have an objection to this line of questioning in terms of lack of

similarity of conditions, remoteness, other factors under 404, 406, and 403 of the Rules of Evidence, and the cases that we've cited to Your Honor, [36] and you indicated we could preserve our objection and have a continuing objection to this line.

THE COURT: You may. I've overruled it in prior rulings for the reasons stated therein, and your objection is noted and preserved on the record.

Q (BY MR. CHRISTENSEN) I gave you a hypothetical of a car that would cost $2,000 to fix, it's old, and the State Farm representative suggests to the owner of the car, "Why don't I just give you $500 in a check, as an appearance allowance, and we'll call it good?" Is that an example of an appearance allowance?

A That's not an example of an appearance allowance as I view appearance allowances, no.

Q Well, isn't an appearance allowance where money is paid to the insured to compensate them for some loss and appearance of their property, as opposed to fixing it?

A Yes, a typical appearance allowance, if you'd like me to explain --

Q Is that a dent on a bumper, or something like that, you have in mind?

A Yes, that's the typical appearance allowance.

Q And it's your sworn testimony State Farm does not emphasize using appearance allowances to reduce average pay per claim; isn't that true?

[37] A My testimony is that we make appearance allowances an option to accurately determine what we owe. The appearance allowances that I'm familiar with are someone that's had an accident, and the estimator's out there writing the estimate, and he says, "Well, you have a scratch here on your bumper."

And oftentimes a person says, "I didn't even notice it, I didn't even see it was there."

And the estimator says, "We can replace the bumper assembly, or if you'll live with the scratch we'll waive a $100 collision deductible," or something like that. That's an appearance allowance.

Q Is it your sworn testimony that State Farm does not encourage appearance allowances as a way to save the company money?

A We encourage appearance allowances in the appropriate case.

Q But your testimony is that it's rarely used.

A Yes, we don't see them very often, that's true.

Q It's certainly not encouraged as something that employees would be asked to set goals on.

A No, the employees in my section have, as far as I know, have no goals on any type of performance review to have a certain number of appearance [38] allowances, or anything like that. We just simply say, if it's appropriate to use them and it makes sense to do so, let's do so.

Q But your testimony was that it's so rarely used, it's not even an issue. Isn't that true?

A Yeah, we just don't see many appearance allowances, that's true.

Q When they are used, they do save State Farm money, don't they?

A Yes, I think you could say that. If, for example, the scratch on the bumper. A new bumper might be $200, and if a person says, you know, "I didn't know about the scratch, I'm perfectly willing to live with it," and we pay $100, that's, to me, a happy compromise.

Q Under the policy, the insured could say, "Yeah, I'm willing to live with the scratch or dent or whatever it is, but I'd like the check for the full amount of the repairs."

A Yes, they could do that.

Q And would they be entitled to a check for $200 from State Farm, and it would be their choice not to repair the car; isn't that true?

A Yes, they own the car, so they can repair it if you want, or not.

Q So when State Farm offers $100 instead of [39] $200, the insured is giving up money they're entitled to get if they accept it?

A Well, is this yes or no?

Q I think you can answer that one yes or no.

A Yes, I think that State Farm is saving $100 in that case. But normally, the conversations that we have with people are, "I simply didn't know it was there. It's fine, these are the kinds of things that drive insurance prices up, and I think that's a fair settlement."

Q Do you tell them, "You're entitled to $200, but I'm offering you $100"?

A We tell them that they're entitled to have that bumper replaced if they so desire. And as I've said, a lot of people that take the appearance allowance say, "No, I just, that's kind of excessive, I don't want that whole bumper replaced."

Q Do you tell them, "Well, fine, if you don't want to replace it, if you'll live with the scratch, you're entitled to a check for what it would cost to replace it"?

A Yes, we tell them up front that they're entitled to an estimate for all the damage, and they don't have to have the car repaired if they don't want to. There are certain cases that it's maybe to their [40] benefit to take a cash settlement.

Q For less than they're entitled to?

A No, I didn't say if you take a cash settlement that you get less than you're entitled to. A cash settlement is an agreement, or an appearance allowance is an agreement that both parties have entered into before we ever issue them a check.

Q But your testimony is you tell the claimant, "There's a scratch on your bumper, you're entitled under the policy to have it replaced, and that would cost $200. If you don't want it replaced, you're entitled to a check for $200, but on behalf of State Farm I'm suggesting that I give you $100."

A Yes, as I've testified, the conversation generally is that the person says, "I didn't notice the scratch, I think it would be excessive for you to have to pay $200. These are the kinds of things that raise our rates, and I think that's perfectly logical and perfectly reasonable, and I'm agreeable to that." That happens.

Q And you deny that appearance allowances have been used for anything other than scratches?

A That's the most, that's the most common use of an appearance allowance. I don't recall, you know -- A dent, maybe, you know, a small dent versus a small [41] scratch, but that's generally how they're used, in my experience.

Q They're certainly not used for serious hail damage on people's property in Colorado, are they?

A Not as a -- I don't consider that as an appearance allowance, no. That's more of a diminished value type of settlement, and often involves when the car has got such hail damage on it that it may be, in fact, a total loss when you add up all the damage. The damage is more than the value, but it's a perfectly drivable car, so you work some type of settlement out so they can retain the car.

Q But you tell them, "You're entitled to have the car totalled"?

A If they want the car totalled they can do that. Most people don't. They know their car, they know it's reliable, and they want to keep their cars.

Q State Farm uses parts, from time to time, from junk yards to fix people's cars?

A We use parts from salvage yards, yes.

Q Is there a difference between a salvage yard and a junk yard, in your mind?

A Yes, the junk yards, in my mind, are a place where old cars go to die, and a salvage yard is a place where they recycle the parts there. Most of them are [42] computerized, and have all their parts inventories on computer. So in my mind there's a difference, yes.

Q It's your testimony that State Farm doesn't try to reduce average pay per claim by using parts from salvage yards; isn't that true?

A We use salvage parts when it's appropriate to do so. And that goes to, yeah, helping with our costs. But my testimony was that, you know, I certainly don't sit down with a person and say, "Your average costs went up this quarter, you don't get a raise." We just don't have that kind of emphasis on it.

Q It's your sworn testimony that when State Farm uses parts from salvage yards to fix somebody's car, they always tell them?

A Absolutely. That's the policy that we have. If I'm going to use a salvage part on someone's car, I don't want them to be surprised about that. I want them to know right up front that I'm figuring a salvage bumper, or a salvage fender, or something like that.

Q It is true that there are circumstances where using a salvage yard part can void at least part of the warranty on the car; isn't that true?

A That may be true. We offer a warranty on that part, and we'll stand behind that part, if the manufacturer's warranty is void, State Farm will stand [43] behind it.

Q State Farm has had a big push over the last number of years to use salvage yard parts, haven't they?

A Not to my knowledge. I don't recall any big push to use them. I think it's always been our philosophy to use salvage yard parts when it's appropriate.

Q It's also your sworn testimony that State Farm doesn't emphasize depreciation as a way to save money; isn't that true?

A Again, we use depreciation as an awareness issue, and when it's an appropriate circumstance, to use betterment or depreciation, then I think we should take it.

Q But it's not emphasized at State Farm.

A I think it's, again, it's an awareness. It's something that we need to be aware of and, in the appropriate circumstances, when common sense calls for it to be used, we use it.

Q Have you ever been made aware of State Farm emphasizing the use of depreciation to save money on claims? Can you answer that yes or no?

A No.

Q Your answer is no, you haven't been made aware of that, or you can't answer it yes or no?

[44] A You asked me if it has been emphasized, and my answer to that is no, it has not been emphasized. It's been an awareness issue, and when it makes sense to use them, we'll do so.

Q All right, you've been to a divisional claims superintendent's conference?

A Yes, I was.

Q And that was in what year?

A That was in probably 1995, maybe 1994.

Q That's where all the divisional claims superintendents from State Farm get together for a few days of meetings?

A Uh-huh, that's correct.

Q Those are important training meetings, aren't they?

A Oh, I don't know that they're important training meetings. There's a lot of topics discussed.

Q They're not social events, are they?

A No, they're business meetings, and we talk about programs that are coming out in the next year, and training programs that may be rolled out, and any changes in our policy, and things like that.

Q And you were at one in '95, did you say?

A I believe that was right.

Q You haven't kept any materials from that [45] conference, have you?

A No, I didn't keep anything from that conference. Just a binder, they had, they gave us a three-ring binder, and I kept that cover.

Q Did you notice somebody at that conference video taping the conference?

A As I recall, there were several general sessions, and then several breakout sessions, and I don't believe the breakout sessions were video taped.

Q But the main sessions were.

A The general sessions, as I recall, may, in fact, have been video taped, yes. I would hate to swear to that. I don't recall whether I saw a video camera there or not.

Q You agree, certainly, don't you, Mr. Kingman, that there's no proper way for State Farm to make a profit on claims?

A Yes, in the claims side of it all we do is pay out the money, we don't take any money in. So it's hard for us to make a profit when we don't take any money in claims.

Q The idea of profit just doesn't fit in claims, does it?

A No, the objective of claims is to pay what we owe.

[46] Q Not a penny more, not a penny less?

A If you're good enough to get it that fine, great. But as I said, I'm not good enough to call it that close in most cases.

Q That's what State Farm teaches, is it not? That's a slogan at State Farm?

A That's a slogan that I think reflects a philosophy of paying a fair value, especially in BI, in bodily injury claims, finding a range that you feel is fair, and paying that range.

Q You've heard hundreds of times at State Farm, have you not, "We pay what we owe, not a penny more, not a penny less"?

A Yeah, I've heard the slogan.

Q Getting back to this concept of profit on claims. An insurance company like State Farm has to make its profit on premiums or on investments, not on claims; isn't that true?

A Yes, that's correct.

Q Claims is where State Farm takes the money it has, and pays what it owes.

A That's right.

Q Mr. Kingman, do you recognize this man?

A Yes, I do.

Q Who is he?

[47] A G. Robert Macherle, he was our claims vice president.

Q For the whole State Farm parent company?

A Yes.

Q Over fire, auto, everybody?

A Yes, I believe he was claims vice president.

MR. CHRISTENSEN: I think this is part of the materials in the exhibit. May I show this to the jury?

THE COURT: Any objection?

MR. BELNAP: No.

THE COURT: You may show it.

(BY MR. CHRISTENSEN) Maybe I could come up here with it. This was the top man in claims for all of the State Farm companies?

A Yes.

Q Would you read what Mr. Macherle has said?

A Sure. "Let there be no doubt that our goal is to give the best, most efficient, and most profitable claim service in the industry."

Q He's wrong, isn't he?

A I don't know that he's wrong. I think I agree with the statement that we should try to be the best and most efficient, and when you take the claim service and roll it in with underwriting and those things, I have no problem with the goal of asking us to [48] be the best.

Q No, I'm talking about the word "profitable." You agree that has no place in that sentence, don't you?

A Again, if you look at the whole picture, I don't have a problem with "profitable" in there. In just the isolated claims function, when we don't take any revenue in, we can't be profitable. But when you combine what we do with our underwriting people and our investment people, then I think it's certainly an appropriate goal to be profitable.

Q Isn't the only way to make claims profitable is to pay less than you owe?

A Absolutely not. If you pay less than you owe, you're still paying out money, so you're still not profitable in the isolated context of looking at just what claims does.

Q Mr. Kingman, you claim you're not aware of any bad faith verdicts against State Farm; isn't that true?

A Yes, that's true.

Q What about the Campbell case?

A I don't believe that it was a bad faith verdict rendered in the Campbell case.

Q Have you seen the judgment from the trial last November?

[49] A I don't know that I've actually seen the judgment. I recall that the jury said that there was a reasonable likelihood of an excess verdict being rendered, and that State Farm

should have paid their policy limits. That's my paraphrasing of what it says.

Q And didn't the judgment also find that State Farm had breached its duty to act in good faith in defending Curtis Campbell by unreasonably failing to settle the Ospital and Slusher claims against Curtis Campbell within the policy limits?

A That may very well be the language, that's right.

Q Isn't a breach of the duty to act in good faith, bad faith?

A Well, I'm not sure of the legal definition of bad faith. To me, bad faith conjures up the idea that there was this intentional, preconceived idea to do something, and I don't believe that there was any of that in the Campbell case.

Q Well, now that we've straightened out the definition of bad faith, is your answer different? Do you know about any bad faith verdicts against State Farm?

A No, my answer is not any different.

Q And you're not aware of any punitive damage [50] verdicts against State Farm.

A No, I've not had any personal experience with punitive damage verdicts within State Farm.

Q And you've not heard of any?

A Not that I can recall, no.

Q Are you aware of any class actions against State Farm?

A Oh, I've heard of, just in the newspapers I've seen a class action suit, I believe, filed by some agents, or some agents that didn't become agents, and one other one dealt with our use of these after-market parts. But those are the only two that I'm aware of. And I'm not very familiar with those.

Q The after-market parts one was in which state, do you know?

A I believe California, but I'm not sure of that.

Q Was that a large class of people?

A I don't know the number of people involved in that suit.

Q Does 2.3 million sound about right?

A I just don't have any idea of the number.

Q Was that recently?

A I believe that's been within the last couple of years.

[51] Q Now, you have handled some auto claims as an employee of State Farm Auto, where the insurance policy was actually written by the State Farm Fire company, haven't you?

A Yes, I have.

Q In fact, isn't the way the State Farm system works, that someone who's on the normal rates with State Farm is with State Farm Auto; if they have too many claims or tickets or whatever, and they lose their favorable rating, then their State Farm auto insurance is written through the fire company?

A Yes, I believe that's correct, that's how it works.

Q Is that called the standard company?

A Yes.

Q Or the standard policy?

A Yes, that's called our standard company.

Q So the policy of State Farm Fire that's called the standard policy is actually the one where people pay extra premiums.

A Right.

Q What's the normal policy called?

A State Farm Mutual Automobile Insurance policy.

Q There's not a term for it, like "standard [52] policy"?

A In the standard company we have a standard policy. In the mutual company we have a mutual policy.

Q Okay. So you have handled, on behalf of State Farm Auto, claims on State Farm Fire policies.

A Yes. As you've indicated, our high risk-type of drivers are technically written through the State Farm Fire and Casualty Company, and we handle the claims that those people have.

Q You don't use different claims handling practices when you handle those, do you?

A No, we don't.

Q When State Farm Auto handles an auto claim, whether it's for auto or fire, the claims handling practices are the same?

A When we handle an automobile claim, we have our procedures and practices, and we handle it, regardless of whether it's a standard company or a mutual company claim.

Q All right, let me see if I can conclude, here. Mr. Kingman, it's your sworn testimony that you see nothing wrong with how State Farm has treated the Campbells; isn't that true?

A It's my testimony that --

Q Let me stop you there. I want a yes or no to [53] this. It is your sworn testimony that you see nothing wrong with how State Farm has treated the Campbells?

A That's my testimony, yes.

MR. CHRISTENSEN: All right, thank you.

CROSS EXAMINATION BY MR. BELNAP:

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[67] * * *

Q Now, Mr. Kingman, this case involving Mr. Campbell, as we know, resulted in a verdict that's called an excess verdict; is that right?

A That's correct.

[68] Q I want to talk about that for a few moments, that concept of excess verdict. Before you came to Utah as a

divisional claims superintendent, were you a claims superintendent in Colorado?

A Yes, I was.

Q And how many years did you function in the capacity of a claims superintendent?

A I was a claims superintendent for about seven years.

Q While you were a claims superintendent in Colorado, did, of the lawsuits that you were responsible for, did any of them result in an excess verdict?

MR. CHRISTENSEN: Your Honor, I'm going to object to this. May I voir dire this witness?

THE COURT: All right.

MR. CHRISTENSEN: Mr. Kingman, you are aware, are you not, that we have requested to see the State Farm files on the cases where State Farm admits there were excess verdicts, and we requested, as part of the evidence in this case, to see those?

THE WITNESS: I'm not aware of all the requests that have been made in this case.

MR. BELNAP: Your Honor, this isn't proper voir dire.

MR. CHRISTENSEN: Yes, it is.

[69] MR. BELNAP: It's also been the subject of prior hearings before this court, and the list of the names of Utah cases, the identification of those have been given, and the courts they were in have been given, and that's been pursuant to prior hearings of this court.

MR. CHRISTENSEN: I don't think this one has, but I want to make a record, I'll be brief.

THE COURT: All right, make your record.

MR. CHRISTENSEN: State Farm has refused to let us see the files in those excess cases, hasn't it?

MR. BELNAP: Are you talking about the Utah cases?

MR. CHRISTENSEN: Yes.

THE WITNESS: I don't know the status of that, Mr. Christensen. I haven't been a party to that.

MR. CHRISTENSEN: You don't know anything about those excess cases?

THE WITNESS: I know that we've had seven excess cases in Utah, and that we've attempted to compile that list of seven.

MR. CHRISTENSEN: That seven you admit to, but you don't keep records, do you?

THE WITNESS: That's seven that we have searched for and come up with and can identify.

[70] MR. CHRISTENSEN: Does State Farm claim it does not keep records of excess cases?

THE WITNESS: State Farm claimant?

MR. CHRISTENSEN: Claim. Does State Farm take the position that it does not keep records of excess cases?

MR. BELNAP: Your Honor, I'm going to continue to object. This isn't proper voir dire. I was laying a foundation, and asking the witness a question. This is cross examination.

MR. CHRISTENSEN: No, I think it's not fair for him to be allowed to make self-serving statements about excess cases, when they've refused to give us the underlying cases, and they have claimed they have no records of such cases. I don't think it's fair to have him give testimony under those facts.

THE COURT: All right, you've laid your foundation.

MR. CHRISTENSEN: Yes.

THE COURT: Let's go back to the question that was objected to. All right, the question that I think was pending when you made your objection, was, "While you were a claims superintendent in Colorado, did, in the lawsuits that you were responsible for, did any of them result in an excess verdict?" Correct?

[71] MR. BELNAP: That's my question.

MR. CHRISTENSEN: My objection is they haven't produced the information, we have no way of knowing if it's true or not.

MR. BELNAP: You can ask him, certainly, on cross examination.

MR. HUMPHERYS: Your Honor, that's not the point.

MR. BELNAP: Your Honor, excuse me.

MR. HUMPHERYS: May we have a side bar?

(Side bar conference held out of the hearing of the jury.)

* * *

[73] * * *

Q (BY MR. BELNAP) Mr. Kingman, while you were a claims superintendent in Colorado for, I think you indicated approximately seven years, in the cases that you handled, did you ever have any of those result in a verdict over the policy limits?

A No, I did not.

Q Now, as a divisional claims superintendent, have you had occasion in the state of Wyoming to, [74] without telling us about those cases, to indicate to this jury whether or not that has occurred while you've been a divisional?

A Yes, while I've been a divisional claims superintendent we've had two cases that were in excess of the policy limits.

Q And can you tell the jury, based upon the way, the procedure that you handled those cases, what you did in those cases?

MR. CHRISTENSEN: Your Honor, I object, same basis. They haven't produced the files. And I don't think it's fair to get into what was done in those cases, where the files haven't been produced.

THE COURT: Overruled, I'm going to allow him to address the procedures that were followed.

(BY MR. BELNAP) Can you tell this jury what procedures you followed in those cases, Mr. Kingman?

A After we received the jury verdict that was more than our policy, we did what we call a claim committee report, and the claim committee report is a report that we complete that indicates that there has been an excess judgment, and that is sent to our corporate offices in Bloomington. We also sent the post trial report that I talked about earlier, and in those cases --

[75] Q To the regional vice president?

A Yes. And in two cases that I'm familiar with, a decision was made to pay the judgments in full.

* * *

[76] * * *

Q Now, are statistics kept within State Farm on the average paid cost?

[77] A Yes.

Q In what way do you use those statistics, Mr. Kingman?

A I look at the average paid costs, and look for any significant spikes one way or the other in average paid costs. And for example, in the state of Wyoming, if I have one claims superintendent's office whose average paid costs are significantly different than another's, I may look at that from a training perspective, and see if we're doing something different in one office than we're doing in another. Or if there's been a spike I'll try to figure out why there's been some kind of dramatic increase or decrease in average paid costs.

Q Now, if you were to see a situation where there was a dramatic increase, Mr. Kingman, under the practice and policy that you've been trained in, and that you use in your division at State Farm, have you ever required any of your superintendents or claim representatives to arbitrarily pay less on a claim than the range of value that that claim would otherwise have?

MR. CHRISTENSEN: Objection, leading.

THE COURT: Sustained.

(BY MR. BELNAP) Have you ever, in the handling of average paid costs, and evaluating claims [78] operations, Mr. Kingman, can you tell the jury how you use that statistic in terms of any goals or requirements with your people?

A Sure. I look at the average paid cost as the end result of the work product. You know, we need claim representatives to promptly investigate claims, to do a good, thorough analysis of liability, to review the medical records, check out whether there's any wage loss, those kinds of things, and come up with a range.

And if you do those things, the cost part of it will take care of itself. So a spike, or a change in the deviation of average be paid cost is really a symptom of a training issue that needs to be addressed.

Q I want to talk to you about, you mentioned the word "claim committee," Mr. Kingman.

A Uh-huh.

Q Now, you've told the jury, and I forgot the figure, and I'm sorry, but you have several offices that you supervise in the state of Wyoming and Utah. When you have a claim committee, do you, and can you tell us whether you involve all of the superintendents on each claim committee within your division?

A Yes, all of the claims superintendents are involved in that process of- - Because of our geography, it's impossible for us to get together. But [79] because we have computers, we can type up the claim committee report, and send it electronically to all of the claims superintendents in my section, and they can review them, and they give me their input, either over the phone or back through the computer. And those responses also go to the superintendent that completed the claim committee report, for his review, or her review.

Q Is a decision made, Mr. Kingman, before each superintendent has an opportunity, and, in fact, does respond to that claim committee?

A No, actually my process is that my secretary will print the claim committee report off of the computer, and then hold it until she gets the responses from the superintendents. And then it is sent to me with the original claim committee report and their responses, so they're all reviewed at one point.

Q Now, in a situation, Mr. Kingman, where you have an office, for instance, say, here in Salt Lake where the divisional is present in an office with the physical location of the superintendents, can you tell the jury whether or not they follow a different procedure, to your knowledge?

A Yes, they do. Because of their metropolitan area, their number of superintendents are all relatively [80] close, so they do convene in a meeting and make decisions on the claim committees.

Q I want to move to a different area, Mr. Kingman. You talked with Mr. Christensen about property damage matters, appearance allowances, and parts that are taken from salvage yards. Are there businesses that actually bring in damaged vehicles and professionally remove parts that are still quality parts?

A Yes, that's what the salvage yards do. If you have a car that's brought in that's been side swiped down the left side, and the right side still has good parts on it, they'll take those right parts, those right side parts off, and if -- And sell, you know, the right fender or the right wheel or something like that.

Q Now, in a vehicle, let's say that's several years old, Mr. Kingman, in terms of fit and appearance and functionality of the parts, can you tell the jury whether or not a part off of a like vehicle of the same age is appropriate to be put on that vehicle, in your opinion?

A In my opinion, it just makes sense. If you have a vehicle that's come to our office, and it's, say, ten years old, and it needs a new right front fender, and you can call the salvage yard and find a right front [81] fender off of a car that's of similar age, you know, if it's ten years old, say ten years old or newer, and there's no damage on it, and it fits, then it's appropriate to use it.

I just think it makes sense to put that type of fender on it, rather than automatically putting a new fender on a ten-year-old car. If we can't locate a used fender, then the option, the alternative is simply to put a new fender on it, and we do that.

Q Mr. Kingman, I'm going to show you what's been marked as Exhibit 119-D. Have you seen that document before?

A Yes, I have.

Q Can you tell us what it is?

A It's a general claims memo, the number is 297, and it's a memo that, I believe the content of this memo talks about pendings, our inventory of open claims.

* * *

[82] * * *

Q (BY MR. BELNAP) Mr. Kingman, on the first page, under "statement of policy," could you read to the jury, please, starting right here, with the word "the," down through the end of that sentence? "The accomplishment"?

A "The accomplishment of our objectives regarding pendings will not be secured by a get-tough policy, nor if we follow a get-rid-of-them-at-any-cost policy. Each claim handled should be considered and evaluated on its merits. Its settlement value should not be increased merely to reduce the total inventory of claims." Would you like me to continue?

Q Please.

A "All changes in settlement value should be supported and documented by good file investigation. We must keep in mind that we are in the retail business of handling claims, one by one, and not in the wholesale [83] business, where blocks of claims are disposed of simply to reduce the inventory."

Q Okay. Could you please move over to the second page. You talked about this briefly with the jury in terms of a training issue, as you called it, when you looked at average paid costs. But is this discussed under the top of the second page, where it talks about proper methods?

A Yes, it indicates the proper methods to reduce pendings, or our claim inventory.

Q Does it indicate -- Well, can you tell the jury if it indicates in there a discussion about investigations?

A Yes, it does.

Q About contact?

A Right.

Q About settlements in proper cases?

A Yes, it encourages that.

Q About prompt and realistic negotiations?

A Yes, that's mentioned here also.

Q And in salesmanship and diligently handling all phases of the claim?

A Yes.

Q And in using initiative?

A Yes.

[84] Q Mr. Kingman, I want to ask you one final question.

A Okay.

Q You indicated to Mr. Christensen, in hindsight, having seen and reviewed all the information that you had, that you may have done something differently. Do you recall those questions?

A Yes, I do.

Q Can you tell us, Mr. Kingman, by your understanding, whether or not State Farm made the decision to pay the judgments in full, with interest and costs, more than nine years before the jury last fall said that the case should have been settled?

A Yes, it's my understanding that we committed to paying the entire amount of the judgments, all the interests and costs, in approximately 1986, and that trial wasn't until 1995.

MR. BELNAP: Thank you.

REDIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Kingman, we went through this in some detail. This was the answer that I think you agreed I had to ask the question nine times, and you had to take a break in order to answer.

A Yeah, I didn't understand it the first time, [85] and the second through the eighth.

Q Do you see the words "hindsight" in that answer?

A It says, "From what I know of the facts of the case."

Q You said, "I know what happened in Sardine Canyon, so I think, based on what I know of the case, I would have concluded there was a likelihood of our insured being found somewhat, to some degree responsible for the accident, and would have paid the $25,000."

You're saying that's what you would have done, had you been making the decisions back in 1981 to '83, isn't it?

A No, that's not what the intent of the response was, anyway. What I'm saying is, or trying to tell you is, what I know now, based on everything that has happened, I would have come to a different conclusion. But as I've said, it's very hard to step back into the shoes of someone in 1981 and make a decision like they had to make.

Q You said you would have kept the Logan case from ever going to trial, didn't you?

A Yes, based on, again, on what I know now, and exercising perfect hindsight, if we could have paid the judgment and kept from going to trial, that would [86] certainly have been a good thing to do.

Q And you reached that conclusion, only seeing 70 percent of the trial in October.

A I've reached that conclusion on seeing the trial in October, attending the first week of this trial, attending all of the hearings --

Q Well, wait a minute. This testimony was given last April. Are you saying your answer that you gave last April was based on what you saw last week?

A I'm saying that the answer that I gave was based on everything that had happened since that trial, everything that I've been a part of.

Q Okay, let me move on. You've made a point that the Campbells insisted they weren't at fault. Certainly nobody ever accused Mrs. Campbell of being at fault, right?

A I believe that's true.

Q In insurance matters, isn't it common to see people who have been involved in an accident, who may feel they're not at fault, but, based on your experience and your investigation, you conclude they are?

A Yes, that happens. I don't know that I would say that it's common. A lot of accidents are rear-enders, and where liability isn't really a question.

[87] Q You've probably even seen people who rear-ended somebody who say they're not at fault, haven't you?

A Oh, there have been people that have said, "The car in front of me stopped too quickly," and that type of thing, yes.

Q And you make the decision whether the case ought to be settled, based on your good judgment and experience, and not simply do whatever the insured says they think you ought to do, right?

A Right. The insured's input is just one factor that we look at when we look at the total package.

* * *

[89] * * *

Q Now, you talked about the organization at State Farm. This regional vice president, that is Mr. Moskalski, currently?

A Yes, it is.

Q He's your boss?

A Yes.

Q He's over both State Farm Auto and State Farm [90] Fire, isn't he?

A Yes, at that level he supervises them both.

Q And you're at this level?

A Yes, I am.

Q There are divisional claims superintendents at State Farm who are over both auto and fire, too, aren't there?

A Not that I'm aware of. I'm aware of separate auto divisional claims superintendents, separate fire divisional claims superintendents, the same all the way down the ranks.

Q You've never heard of one man or woman holding that position for both fire and auto?

A There used to be, in some of our rural areas where we didn't have enough, either enough people for one person to supervise, or enough claims, one person could supervise both. But we've grown to the point where I don't know if there are any currently or not. I don't believe there are.

Q That was true in Utah in 1987, wasn't it?

A I believe for a short period of time there was an individual that supervised both, at that level, yes.

Q That was John Crowe.

A That's what I recall, yes.

[91] Q Our next witness.

A I don't know if he's your next witness or not.

Q Now, you testified that there are post trial reports that are done after cases are tried, that are circulated, and they're sent to the regional vice president's office.

A Yes, among others.

Q Mr. Moskalski and people who work with him get those.

A Yes, they do.

Q Do you know that I deposed Mr. Moskalski in this case a few days from the time I deposed you?

A Yes.

Q Are you aware that Mr. Moskalski testified that lawsuit report, they only make one copy in the regional office, it's circulated to each person, and then immediately destroyed. Are you aware of that practice?

A I attended Mr. Moskalski's deposition, and my recollection of his testimony is that a copy of that report is sent to his office, and it is seen by vice president of operations and our vice president of agency and himself. There's only four people in that executive office, so they make one copy, printed off the computer, [92] and route it among themselves.

Q And then they destroy it.

A Yes, after they've read it, and if they don't have any questions on it or -- If they have any concerns they can call the claim file or call up the divisional, and ask questions. But if they've looked at it, and it's a judgment that is within the policy limits, it follows kind of what we figured would happen, and there's no followup necessary, then I believe they throw it away.

Q When I asked Mr. Moskalski if I could see those reports, he said they don't exist, didn't he?

A I'm sure that after he's reviewed them, that he throws them away.

Q Are you denying, Mr. Kingman, that State Farm doesn't want people like me, and people like this to see those reports?

A That's not a motivation for whether we keep reports or whether we don't keep reports. We keep hundreds and hundreds of thousands of reports.

Q You don't keep those.

A To my knowledge, we've not kept a report on the number of trial summaries that we have. We keep reports on the number of cases that go to trial.

Q That report's important enough, in your mind, [93] that it was worth your coming here today and telling this jury about it, wasn't it?

A Which -- Which report are you referring to?

Q That lawsuit report.

A Yes, we keep a lawsuit report. I don't know that I've mentioned it to the jury before now or not.

Q But it's not important enough for Mr. Moskalski to keep.

A The lawsuit report is different --

Q Excuse me, I'm talking about the post trial report.

A Okay.

Q I'm getting my terms -- The post trial report that you've told this jury about is the one Mr. Moskalski says they have one copy, and as soon as it's read it's destroyed.

A The post trial report is one report on a specific case. The outcomes of those trials are kept on a separate report, and that report is the BI lawsuit report, and it's readily available to look at.

Q But that doesn't tell us anything about individual cases, does it?

A No, it tells number of trials and wins and losses and that type of thing.

Q And win is how State Farm defines win.

[94] A I believe that's true, yeah.

Q On that report there are a whole lot of cases that State Farm calls wins where the jury actually ruled against State Farm, aren't there?

A Our definition of win is, "Did the jury award more than we last offered?" That's a win for us.

Q And so there are a lot of cases where the jury actually ruled against State Farm in the trial, but State Farm counts it as a win.

A Yeah, the cases are that we've offered X-amount, and the jury has awarded an amount less than that, we consider that a win. We know going in there that we owed something, we just couldn't agree on the amount. And when it's a win for us is when the jury said something like, we've offered $15,000 and the jury awards $13,000, that's a win. We don't take a position ever, or hardly ever, that we don't owe anything.

Q And even if State Farm put their insured through years of litigation and offered the $13,000 the night before trial, they'll count it as a win if the verdict is one dollar less than that.

A The litigation process is ongoing, and demands and offers are made throughout the whole thing. And we very seldom make a new offer shortly before trial unless it's in response to a new demand that's been [95] made.

Q Do you deny, Mr. Kingman, that State Farm views trying lawsuits as a way to reduce average pay per claim?

A I don't -- No, State Farm doesn't look at trying lawsuits as a way to reduce average paid claims. Lawsuits

are very expensive, and for us to look at lawsuits as a way to save money is, it's just not true.

Q I'm going to show you a document that's been obtained through discovery in this case, I think we got this from Mr. Crowe. I think there's been an admission it's authentic. Let me show you a copy of it, it's dated May 14th of 1985. Do you see who signed this document?

A It's signed by G. Robert Macherle.

Q Is this the fellow whose poster is here, right in front of me?

A Yes, it is.

Q Do you see under the columns of numbers a paragraph that starts, "The progress made last year"?

A Yes.

Q Would you read that, please.

A "The progress made last year in stemming out indemnity payment increase by trying more lawsuits, unfortunately, was completely wiped out this year as we [96] increased our average indemnity payment by nearly $700, and tried only 17 percent of the lawsuits that we closed. As a result, we won 90 percent of the cases that we tried. There are a number of divisions who are able to try 30 percent or better, and still post impressive win percentages."

Q Now, again, a win is how State Farm defines it, not how the jury defines it, right?

A Yes, all I can speak to is what I consider to be a win.

Q It's pretty clear from that, that State Farm is telling the company, the claims people, "Try more lawsuits, it's a way to reduce average indemnity payment," isn't it?

A I think what it's saying is that we should try more lawsuits. But we did that, and it doesn't look like it worked.

Q That's how you read that?

A It says, "We made progress in stemming our, or the progress we made in stemming our indemnity by trying more

lawsuits was wiped out because we increased our average indemnity payment by $700."

Q It says, "We tried only 17 percent," and then he says, "Some places that tried 30 did well."

A Yes.

[97] Q Don't you take that as encouragement to try more lawsuits to reduce average indemnity payment?

A No. My decision on whether or not I try a lawsuit is based on the facts of that case.

Q And this is General Claims Memo 428?

A Yes, I believe it's dated 1985.

Q It goes out to the whole company, doesn't it? The whole claims part of the company.

A It goes out to the divisional claim superintendents.

Q It goes to regional vice presidents, divisional manager, divisional claims superintendents, claims superintendents, and general claims staff.

A Right. So it goes to the level of claims superintendent, there.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF BILL LITHGOW, JUNE 13, 1996

[Vol. 7, R. 10262, commencing at p. 137]

* * *

BILL LITHGOW called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.

A Bill Lithgow, spelled like the actor, John Lithgow.

* * *

Q What's your occupation?

A Retired.

[138] Q When you were employed, where did you work?

A I worked out of the Ogden office of Farmers Insurance.

Q And approximately how many years did you work for Farmers Insurance?

A About twenty-three years.

Q Did you testify as a witness in the trial in this case last October?

A I did.

Q Did I call you a few days before that trial and indicate to you that you'd be listed as a witness on State Farm's witness list?

A Yes, you did.

* * *

Q In the course of that conversation, did I ask you if you had had any involvement in the Campbell accident investigation?

A Yes.

Q And did I ask you if you remembered that [139] case?

A You gave me a few clues, and I recalled it quite well, yes.

* * *

Q (BY MR. CHRISTENSEN) Exhibit 32 is entitled "Investigation Report," it's a typed document. Is that something that you dictated?

A I did.

[141] * * *

Q Let me cover with you the things you did in between when you were assigned and when you wrote the [142] report, what information you had and what information you didn't have. Let's start out with the information you had. Did you visit the scene and take photographs?

A Yes, I did.

Q Did you take photos of the automobiles in the salvage yards?

A I did.

Q Did you obtain a copy of the investigating officer's report?

A Yes, I did.

* * *

[144] * * *

Q Did you take a statement from Curtis Campbell?

A Yes, I did.

* * *

[146] * * *

Q Did you have several contacts with the Farmers insured, Mr. Brooks?

A Yes, I called Mr. Brooks, I think twice.

Q Now, was Mr. Brooks a witness to the accident?

A No.

Q What was his involvement?

A Well, he is our policy holder, he's the man we insured.

[147] Q And was the car that Todd Ospital was driving, was that one that Mr. Brooks owned?

A Yes.

Q Were there two different insurance companies that provided some insurance for the Ospital accident?

A Yes.

Q Farmers was one?

A Farmers was the primary insurer of that vehicle.

Q And was Allstate also involved?

A Yes, theirs would be additional coverage over and above our coverage.

Q Was that because they insured the Ospitals?

A They insured the Ospitals, yes.

Q And Farmers insured the car?

A Correct.

* * *

[148] * * *

Q Have we now made a complete list of what you had when you wrote your report, which was later dated July 9th of 1981?

A Yes, that would be it.

Q Now, let me cover with you some of the things that you didn't have. Other than taking the statement of Mr. Campbell, did you have any eye witness statements from people who claimed they'd actually seen the accident happen?

A No, I didn't.

Q At that time, did you even know that people such as Mr. Gerber, Mr. Chipman, those people were witnesses?

A I did not.

Q Did you have medical records on Mr. Slusher?

A I didn't.

Q Did you have a medical report from his doctor?

A Did not.

Q Had you consulted with any experts about the accident?

A No.

Q All right, let's -- So would it be fair to say you had very limited information?

[149] A I had all the information I needed to make this report at that time.

Q What were Farmers' insurance limits?

A On the first page, there, most of the way down it indicates 30-60-50. The 30 means $30,000 liability coverage, which could be extended to one person, to one injured person, the $60,000 is for two or more persons. The $50,000 refers to any property damage that was caused. And the $5,000 refers to medicals, and perhaps funeral expense, I forget that part of it now. I've been gone four years, but it refers to any persons in the insured vehicle, which would be Mr. Brooks' vehicle.

Q Now, you knew that Mr. Slusher was threatening to make a claim against the estate of Todd Ospital?

A I assumed he would be.

Q And which of these limits would apply to that claim?

A You mean, are you referring to Mr. Ospital?

Q Yeah, how much --

A Oh, just the $5,000 --

Q No, I mean as far as Slusher suing Ospital?

A Oh, I see what you're saying. Just, the only applicable coverage that's available under that coverage [150] would be $30,000 for injury.

Q So you had a limit of $30,000? Is that liability limit?

A Yes.

Q Based on the limited information that you had on the date you wrote this report, did you make a decision what to do with that $30,000?

A I certainly did.

Q And what was that?

A Pay it, because it was obvious that the injuries were of a value in excess of $30,000, even with the limited medical information I had.

Q Did the law of joint and several liability apply at that time?

A Yes, that was important to this case.

Q Now, was your report -- and again, I'm referring to this four-page July 9th report -- was that, this written basically to justify the decision to pay the $30,000?

A Yes, I needed nothing further than this.

Q Was this a time when you were unusually busy in your work?

A Yes, it was a heavy work load of cases to investigate, so I was interested in closing this file and getting on to other cases.

[151] Q All right, let me show you another page of this report. Under the heading "Contribution and Subrogation," would you read that, please?

A "It is felt that the real cause of this accident is the insured's excess speed, and the contribution from Mr. Campbell, Campbell's insurer is not in order."

Q Was that statement based on this information?

A That's the conclusion I made at that time, based on that first information.

Q Were you aware, when you said that, that there were a number of witnesses who put the fault for the accident on Mr. Campbell?

A I was not aware of that.

Q Were you aware that there was evidence that Mr. Ospital was not speeding?

A At the time I made the report, I was not aware that he might not be speeding.

Q Okay. Are you aware that State Farm is claiming in this case that this report represents your best analysis of what the facts of this accident show?

A Yes.

Q Do you see this $75,000 figure?

A Yes, I do.

Q "The value of Slusher's case is estimated by [152] this CR," that's you, "to be approximately $75,000." Are you comfortable with this jury believing that that accurately would represent a fair value of Mr. Slusher's claims?

A No.

Q Would you explain that, please?

A All, basically all I was interested in, I threw a figure to Farmers, essentially telling them, "You may as well pay your $30,000, because we have a case that's definitely worth more than the policy limits of $30,000," so it really didn't matter what figure I put down, as long as it was in excess of $30,000.

Q For your purposes in preparing this report, would it have mattered if that figure had been $50,000 or a million?

A Not at all.

Q If you had done an actual evaluation of a case of this seriousness, what would you have done that you didn't do that we've listed?

A If I was making an expert evaluation I would have probably had to wait at least two years, not one week. I would have had to have extensive medical reports with prognosis and diagnosis of the various problems.

Q Now, have I, in the prior case did I ask you [153] to look at the letter which listed all of Mr. Slusher's injuries?

A Yes, I recall you did last fall.

Q And you recall indicating, from looking at all those injuries, having an opinion, based on your experience, of what Mr. Slusher's claim, if you'd done a more careful evaluation back in 1983, would have been worth?

A Excuse me, will you state that question again.

Q Yeah, that's pretty convoluted. You evaluated this case -- Let me lay a little other foundation. After you decided to recommend that the $30,000 be made available, did Farmers go ahead and do that?

A Yes, they did. I don't know the time sequence, because I released the file about as soon as I did my investigation.

Q And as far as you know, was that $30,000 made available to Allstate, who took over the role in the matter?

A Yes.

Q Did you have any reason to go back and revisit this report, or to change your evaluation?

A No, there was no need for me to go back, [154] because whatever was the situation there, I knew we had to spend our $30,000, in view of joint and several liability and other factors.

Q Back then, would it have mattered if the facts ultimately had shown Mr. Ospital 1 percent at fault, or 99 percent at fault?

A It didn't make any difference until the days of comparative negligence.

Q Was part of the decision -- Strike that, I'll move on. You've had an opportunity to look at a letter the jury's also seen, listing Mr. Slusher's extensive injuries. Were you asked to come up with what would be a more accurate evaluation of those injuries in the '83 time frame?

A You mean in recent times, which I haven't been asked?

Q Yes.

A Yes, I was.

Q And what do you think those claims were fairly worth back in 1983?

A Somewhere in the bracket of perhaps a quarter of a million to half a million.

Q And before I move on, would that, in your mind, be a more fair assessment than the one in this report?

[155] A Definitely.

Q All right, let me clean up a couple of items, and I think I'm through. Did you speak with Officer Parker after you wrote this report?

A I did, by telephone.

Q And is this document something that you used at Farmers to record that kind of information?

A Yes, it is.

Q I think I need the second page. Will you tell us the date of that interview with Officer Parker.

A July 30, 1981.

Q So that was about a month after you wrote the report we've been looking at?

A Yes.

Q And Officer Parker reiterated the 80 mile per hour speed to you, and gives you that Campbell was not at fault?

A That's what he said.

Q Was this about the last official thing that you can recall doing on the case?

A Yes, it was. There was no need for me to become further involved in the case.

Q Now, Mr. Lithgow, is this the fourth time you've explained, under oath, that your July 9th report doesn't accurately reflect your beliefs as to the value [156] of these claims?

A I missed your question when you started saying "Not." Can you restate that?

Q Yes. Is this the fourth time you have explained, under oath, that your July 9th report should not be taken as reflecting your true evaluation of these claims?

A Yes.

Q Did you sign an affidavit last October to that effect?

A Yes, I did.

Q Was your deposition taken by State Farm Insurance last year by Mr. Stuart Schultz, where you explained this?

A Yes, I did.

Q Did you testify last October in the trial, and explain this again under oath?

A Yes.

Q Was State Farm there at that time?

A Yes.

Q Does it make any sense to you that State Farm continues to represent that that report is an accurate evaluation of what you honestly thought about these claims?

MR. SCHULTZ: Objection, argumentative.

[157] THE COURT: Overruled.

THE WITNESS: It seems a bit excessive, yes.

* * *

[158]

CROSS EXAMINATION BY MR. SCHULTZ:

* * *

Q Let me just ask you, first, a little bit about the information that you knew when you prepared your report. And I'm just going to refer to it as the report of July 9th. Is that okay?

A Yes.

* * *

Q Okay. Now, Mr. Lithgow, part of your job in preparing this report was to identify the facts that you had been able to determine about how the accident happened. Is that right?

A Yes, correct.

Q Okay. Now under the heading, "Facts of Accident," can you see that?

[159] A Yes.

Q You identify a driver.

A Mr. Ospital.

Q "A" refers to Todd Ospital?

A Yes.

Q Now, in explaining this accident, you have said -- I'll just say "Ospital" instead of "A," okay? "Todd Ospital southbound at a speed substantially in excess of the speed limit, swerved to his right into the safety lane but did not get off the black top, when he was presented with an oncoming car in his lane which was in the act of passing. The insured lost control, over corrected and swung into the northbound lane, striking B vehicle." And "B" would be Mr. Slusher?

A Correct.

Q Okay. So at the time you prepared this report, you had information in your possession that told you that Mr. Ospital had swerved to the right to avoid a car that was passing in his lane; is that correct?

A I had two pieces of information.

Q Okay, but you knew that, right?

A I knew that from the information I had.

Q Did you get that from the police report?

A From Mr. Campbell and from the police report.

Q Okay. And so, given that information, that [160] there was a car trying to pass, and that Mr. Ospital's car was heading in the same lane towards that car that was passing, what was the significance to you of the fact that Mr. Ospital was traveling at a speed substantially in excess of the speed limit?

A I'm not sure of what you're asking, Mr. -- If this is the correct answer. I was really, since our insured driver was deceased, I was going at that time on the police report.

Q Okay. Well, what I'm trying to get at was, in evaluating whether Mr. Ospital was at fault for this accident, was it important to you to know that there was evidence that he was traveling at, substantially in excess of the speed limit?

A Not very important.

Q That wasn't important, okay.

A No.

Q Okay, let's go to page 3. You see under the heading "Contribution and Subrogation"?

A I do.

Q This is where you give your statement of what the cause of the accident was.

A Yes.

Q Can you see there -- Well, just tell the jury, what do you say the real cause of this accident [161] is?

A It is, he felt that the real cause of this accident is the insured's excess speed --

Q Okay, and then when you say, "and contribution from Mr. Campbell or Campbell's insurer is not in order," is what you're saying there, essentially, is that you don't think, based on the information you had --

A You say "don't think." That's what I thought at that time.

Q Well, I'm sorry, I didn't finish my question.

A Sorry.

Q What I was asking you, at that point in time, you did not think that Mr. Campbell was at fault for the accident, did you?

A That's right, at that time.

Q Okay. And that was in spite of knowing that Mr. Campbell was in the act of passing, and that Mr. Ospital had had to swerve partially out of his lane to avoid that, correct?

A That sounds correct.

Q Let me just show you this part of the report, now, page 4, under the heading "Proposed Disposition." You again say in the last sentence of that paragraph, that, "At the present time it appears there will be no [162] contribution expected from the Curtis Campbell policy."

A Yes, that's the statement I made at that time.

Q Okay. So is it correct, Mr. Lithgow, that as of the time that you prepared this report, given the information that you had, you came to the conclusion that the cause of this accident was the speed of Mr. Ospital.

A That's what I felt at the time.

Q Did you ever change that report?

A There was no need to change it.

Q Did you ever change it?

A Never did.

Q You had a copy of the police report prior to the time that you filled out your report; is that correct?

A Yes, I did.

Q And just for the benefit of the jury, Mr. Lithgow, you're familiar with these kind of reports, aren't you?

A Yes, I am very familiar with them.

Q And the officer puts a little diagram on the report?

A Yes.

MR. SCHULTZ: Can I just show this to the [163] jury, Your Honor?

THE COURT: You may.

Q (BY MR. SCHULTZ) And does that diagram -- And then underneath the diagram he gives an explanation.

A Yes.

Q Isn't that right?

A Right.

Q And in that report, Mr. Lithgow, did the police officer indicate that there was a non-contact passing vehicle involved in this accident?

A Yes, it so stated on the report.

Q And so you knew that, as well?

A Yes.

Q And you were familiar with this road, weren't you?

A Very familiar with it.

Q You lived up in that area?

A I lived at the south end of Cache valley at the time.

Q And you knew it was a two-lane road, correct?

A Yes.

Q After the date that you prepared this report, you talked to the officer.

A About a month later.

Q You talked to him by telephone.

[164] A Yes.

Q And this document, here, is a summary of your discussion with him?

A Yes.

Q Did the police officer, Mr. Parker, did he give you any information that led you to believe that your conclusion about Mr. Ospital's speed being the cause of the accident was wrong?

A He gave no indication at that time.

Q And, in fact, I don't know if you did, but somebody's underlined this, here, "Officer feels the no contact vehicle is not negligent."

A Correct.

Q And the no contact vehicle is Mr. Campbell.

A Correct.

Q So was it pretty clear to you, Mr. Lithgow, that if Kent Parker was called to be a witness, he would not, or he would support a conclusion that the cause of the accident was Mr. Ospital's speed?

A Are you speaking of that time, or today?

Q I'm talking about when you talked to him.

A At that time he felt that Mr. Campbell was in the clear.

Q I didn't hear what you said.

A At that time he felt Mr. Campbell was not at [165] fault.

Q And that Mr. Ospital's speed was the cause of the accident.

A That's what he said.

Q And after you talked to him, you didn't go back and make any changes in your report, did you?

A It wasn't necessary because our $30,000 was committed.

Q I understand that. But I'm just asking a question. You didn't feel the need to change anything in your report.

A No, any subsequent information would not have made any difference in our decision.

Q Regarding other witnesses, Mr. Lithgow, although you had not talked to Mr. Gerber or Mr. Chipman at the time that you prepared your report, I believe at the last trial you did testify that you did actually talk to them around the same time as when you talked to Officer Parker; is that correct?

A I didn't talk to them personally.

Q I'm sorry, you saw statements that had been taken?

A That's correct, I saw statements arrive into the file from our Salt Lake office.

Q And it was around the same time as you talked [166] to Officer Parker, correct?

A I don't remember. I think so.

Q Okay. And after you saw those statements, you didn't change your report.

A There was no need to jump through further hoops, no.

Q You didn't go back and say, "Contribution is in order for Mr. Campbell, or Mr. Campbell's insurance policy," in your report, did you?

A No, I was simply taking care of Farmers Insurance interests, so it wasn't necessary.

Q One thing on that police report, Mr. Lithgow, that I wanted to, that was pointed out to you by Mr. Christensen. Let me show you this just quickly, Mr. Lithgow. Over here on this part of the report, the officer lists what he estimates the speeds are of the two cars.

A Yes.

Q Can you see that?

A Yes, I can.

Q And I'll give you this back.

A That's fine, I can read that.

Q Okay. And the two cars are identified as vehicle 1 and vehicle 2.

A Yes.

[167] Q And vehicle 1 is who?

A That referred to Mr. Slusher's vehicle.

Q Okay. And vehicle 2 is the Ospital vehicle, then?

A Correct.

Q And so the officer said -- And there's different speeds, here. Travel speed, he says the Slusher vehicle's travel speed he estimated at 50 miles an hour. Do you see that?

A Yes.

Q And the travel speed of the -- Did I say that right?

A Yes, you did.

Q The travel speed of the Slusher vehicle he estimated at 50?

A Correct.

Q And the travel speed of the Ospital car at 80 miles an hour, do you see that?

A Yes.

Q Now, do you understand that there's a difference between travel speed and impact speed?

A Oh, yes.

Q Okay. Is the speed that he identifies at impact, does that mean that's what he thinks the speeds of the two vehicles were when they actually hit?

[168] A Correct.

Q Okay. So when the Ospital -- Can you identify from the report what kind of a car Mr. Ospital was driving?

A Yes, that was a 1979 Mercury Bobcat.

Q That's a fairly small vehicle?

A Small, low-powered vehicle.

Q And the other car? The Slusher vehicle?

A Yes, that is a 1976 Ford van.

Q And the van would be heavier than the Bobcat?

A Very much so.

Q Okay. And when these two vehicles hit, their speeds at impact were not a whole lot different; is that correct, according to the officer?

A Yes, that's correct.

Q About 50 for Ospital and about 40 for Slusher.

A Correct.

Q So with that kind of a speed, would you expect the Bobcat to knock that Ford van backwards?

MR. CHRISTENSEN: I'm going to object for lack of foundation. I don't think there's been foundation laid that this man is an accident reconstruction expert.

THE COURT: Sustained. Lay some foundation.

[169] Q (BY MR. SCHULTZ) Did you have experience investigating automobile accidents and being familiar with speeds, travel speeds, impact speeds, and the effect of those speeds on causation of accidents?

A I was not a reconstruction expert. I could only make guesstimates.

Q Did you have to make some judgments as a claim representative with respect to speeds and impacts?

A Oh, yes.

Q Did you have to deal with accident reconstruction experts occasionally on cases that you handled?

A Occasionally I would call on an expert.

MR. SCHULTZ: We'd submit it, Your Honor.

THE COURT: I'll allow you to ask the question.

MR. SCHULTZ: Okay.

Q (BY MR. SCHULTZ) The question is simply this, Mr. Lithgow. Would you expect, with those relatively close speeds, that a Bobcat would knock a Ford van backwards?

MR. HUMPHERYS: Your Honor, hold on just a minute. We've got a lot of assumptions, here: At what angle, if this is a direct head on. There's a lot of things that would make this question unable to be [170] answered, given the lack of detail about it.

THE COURT: Well, I'll allow him to answer the question to the extent that he can.

MR. HUMPHERYS: Well, he just said if they hit it would have knocked it back. At what angle? Directly on? That's what I'm getting at.

THE COURT: I'm overruling the objection, allowing him to pursue the question, and then you can cross-examine.

THE WITNESS: Would you repeat your question, please.

Q (BY MR. SCHULTZ) The question is simply with the van going at 40 miles that's very much heavier than the Bobcat, the Bobcat going 10 miles an hour faster, based on your experience, would you expect that Bobcat to knock the van backwards?

A No, I would expect they'd pretty much stay in the same spot.

Q Now, let me ask you about the injuries, okay?

A Yes.

Q You said that you didn't have very much information about injuries; is that right?

A No, I -- Well, I could observe some of Mr. Slusher's injuries in the hospital, and Mr. Barrett, who was there in the hospital at the same time, related [171] some of the injuries to me.

Q Okay. Back to your report, again, Mr. Lithgow. See the heading, "Potential Claimants"?

A Yes.

Q You've identified Mr. Slusher, there. You apparently knew at the time you prepared this report, that Dr. Terry was treating Mr. Slusher?

A Yes.

Q And that Dr. Terry had told him he was going to have to probably restrict his profession to something that didn't involve physical exertion, but more of the brain than the body, I guess?

A Yes.

Q Okay. And did you understand that that would involve him probably changing professions?

A Yes.

Q You also knew that he'd been hospitalized for about a month after the accident?

A Correct.

Q This report, here, says that he's going to have to have a nerve transplant in the left arm, or else he will have very little use from that arm?

A Yes.

Q Do you see that? You note, here, there was flesh removed from the upper part of the left arm, that [172] he had elbow injuries, that his right knee cap had to be removed, there was cartilage lost, there was a fractured nose, and a fracture of the collar bone. You knew all those things, right?

A Yes.

Q Now, let me also show you a document.

MR. SCHULTZ: This was marked, Your Honor, as Exhibit 35 in the trial last fall. I don't have the original, but I have a copy of it. Let me just show you this, Mr. Lithgow.

Q (BY MR. SCHULTZ) This is a statement, or I should say a summary of some information that one of your associates received from Chris Webb; is that correct?

A Yes.

Q And this would have been available for you to review?

A This was available to review after I'd dictated my investigation report.

Q Right. Can you just identify what additional injuries -- Well, is there a date on it, Mr. Lithgow?

A It's dated July 8, '81, and I saw it for the first time on July the 13th.

Q So it was within a couple of weeks of when you prepared your report?

[173] A Yes.

Q And what injuries does Mr. Webb report he was aware Mr. Slusher had?

A A broken collar bone, punctured lung, left arm nearly severed, lost radial, it should have been lost -- Yeah, lost radial nerve, smashed right knee cap, and injured ankle. He must have two more operations on his arm, and it will take eighteen to twenty-four months to recuperate.

Q Okay. And so that was something that was at least available to you, and if you chose to, you could have incorporated that into your report, or supplemented it if you chose to?

A If it was necessary.

Q So is it pretty clear, Mr. Lithgow, that at the time you prepared this report, you knew that Mr. Slusher had some very serious injuries?

A Yes.

Q Now, with respect to the liability insurance that you've identified was available through Farmers, the $30,000 liability limit.

A Yes.

Q Is it correct that those limits are paid, or that that insurance coverage is available to pay for claims that are made against an insured person?

[174] A Yes.

Q And those monies are used to make payment when the insurance company reaches the conclusion that that insured person is legally liable for the claim.

A That would be a fair statement.

Q And another way to say it is, the insurance company pays that when they think the insured person is at fault for the accident, right?

A At least 1 percent at fault.

Q And that's fault, right?

A Yes, negligence or fault.

Q And back when you made your decision to pay the $30,000 limit, you didn't think that Mr. Ospital was only 1 percent at fault, did you?

A No, based on the limited information I had, I would have to feel he was largely at fault.

Q When you prepared your report with the information you had regarding the injuries to Mr. Slusher, you indicated that you thought Mr. Slusher's case -- And I'm reading down here, second paragraph under the heading "Potential Claimants" of Exhibit 32.

A Correct.

Q You indicated that, "The value of Slusher's case is estimated by this claim representative to be [175] approximately $75,000." Right?

A That's what I said.

Q And again, you never changed that and wrote a new report on that, am I right?

A There would be no point in doing so.

Q And you didn't do it, right?

A No.

Q Now, today you've said that your opinion now is that Mr. Slusher's claims have value of a quarter of a million to $500,000?

A Yes.

Q Do you recall being asked that same question last November 1st in this trial?

A I don't specifically remember. Maybe you could restate the question and answer.

Q Okay.

MR. SCHULTZ: May I approach the witness, Your Honor?

THE COURT: You may.

Q (BY MR. SCHULTZ) I don't mean to quibble with you, Mr. Lithgow, but let me show you what you said last fall.

A This is the deposition, I take it?

Q No, this is the trial transcript in this same courtroom.

[176] A Right.

Q Okay. Starting at the bottom of page 1134, the question is, "As you understand it now, based on your experience since then, what do you think this case of Mr. Slusher was fairly worth?"

You say, "In '81?"

"Yes."

And your answer was what?

A $200,000-plus.

Q Okay. You did not say a quarter of a million to $500,000, did you?

A Well, I think the plus takes care of that.

Q But you didn't say that, did you?

A I didn't say that, no.

MR. SCHULTZ: That's all I have, thank you.

REDIRECT EXAMINATION BY MR. CHRISTENSEN:

Q In the affidavit that you signed last year, what was the value that you gave, potential value for Mr. Slusher's claims? Let me refer you to paragraph 8.

A As more information became available --

Q Just tell us the figure.

A Okay, I said it had a value of several hundred thousand, perhaps as high as one-half million dollars.

[177] Q Did State Farm's attorneys ever talk to you before they put you on their witness list last October?

MR. SCHULTZ: Objection, irrelevant.

THE COURT: Overruled.

THE WITNESS: No.

Q (BY MR. CHRISTENSEN) You were asked if it would have been important to you to know that there was information indicating Todd Ospital may not have been speeding, and you said not very important. What did you mean by that?

A It would have been important today, under comparative, but not in those days, because if Mr. Ospital was found to be 1 percent or more at fault, it's the same as a hundred percent.

Q Did you quickly make the decision it just wasn't worth gambling in this case?

A It definitely wasn't. I felt that a jury would somehow find him 1 percent at fault.

Q At least there was risk of that?

A Very much so. Even at a much lower speed than even the speed limit.

Q Where the collision occurred with Mr. Ospital across the center line, when he hit Mr. Slusher, was that a factor to you in determining to make the Farmers Insurance limits of $30,000 available?

[178] A Yes.

Q If I were to represent to you that an accident reconstructionist, Mr. Newell Knight, did a scientific analysis of the angles that the Slusher and Ospital vehicles collided at, their relative speeds and weights, and gave opinions over what he would expect vehicles like that to do, would you suggest that the testimony you just gave would be more reliable than that?

A I have used the services of Mr. Knight, and I would say what he found out would be definitely a lot more reliable than what I wrote on my report.

Q Now, you were asked repeatedly, Mr. Lithgow, if you went back and changed your report, and you repeatedly said you did not, it wasn't necessary. If you had gone back and taken the time to change that report, and change that $75,000 figure on Mr. Slusher to a half a million dollars, would it have changed anything at all that you or Farmers did?

A None at all.

Q Did you already put up the maximum insurance you had?

A We did.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF MANUEL MENDOZA, JULY 9, 1996

[Vol. 20, R. 10275, commencing at p. 104]

* * *

MR. HUMPHERYS: Your Honor, at this time we have about a page and a half of a portion of the [105] deposition of Manuel Mendoza that we would like to simply read into the record.

THE COURT: Proceed.

* * *

MR. HUMPHERYS: I would like to simply state on the record that Mr. Mendoza has been referred to earlier, and his deposition, portions of it have been read or referred to.

His deposition was taken on February 22nd, 1994, and he was designated as State Farm's 30-B-6 witness for all purposes.

MANUEL MENDOZA called as a witness by and on behalf of the Plaintiff through deposition, having been first duly sworn, was examined and testified as follows:

MR. HUMPHERYS: On page 6, starting at line 6.

Question. "Your employment?"

Answer. "I'm employed by State Farm Mutual Automobile Company."

Question. "For how long have you been so [106] employed?"

Answer. "Thirty-five years."

Question. "What is your current job capacity? Your job title?"

Answer. "I am an attorney for State Farm."

Question. "How long have you been claim counsel?"

Answer. "Since 1985."

Question. "In what department do you work? The legal department?"

Answer. "The general claims department."

Now, turning to page 310, line 5.

Question. "Given your claims experience, have you, would you reasonably anticipate that a significant excess verdict against an insured would be a traumatic and stressful situation?"

Answer. "Traumatic and --"

Question. "Stressful."

Answer. "To whom?"

Question. "To the insured?"

Answer. "Yes, I would say it would be traumatic."

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EXCERPTS OF TRIAL TESTIMONY OF ELTON "BUCK" MOSKALSKI, JULY 9 & 10 & 11, 1996

[Vol. 20, R. 10275, commencing at p. 181]

* * *

ELTON "BUCK" MOSKALSKI called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BELNAP:

Q Mr. Moskalski, will you please tell us what your name is, and then what you go by as a shorter name?

A My real name is Elton Moskalski, I travel under the alias of Buck, as in male deer.

[182] Q Would you spell your last name?

A That's M-O-S-K-A-L-S-K-I.

Q Thank you. Mr. Moskalski, will you tell the jury who you work for, and what your title is.

A I work for State Farm Mutual Automobile Company, and my title is regional vice president, which means I'm the chief executive officer for the states of Colorado, Wyoming, and Utah.

Q And is that known under State Farm parlance as an RVP?

A That's right, regional vice president.

* * *

[183] * * *

Q And are you licensed to practice law, if you chose to do so, which you don't, as I understand?

A I'm licensed to practice in the state of Virginia in federal courts, but I never have.

Q All right. When did you start with State Farm?

A I started with State Farm in June of 1965 right out of law school.

Q And can you give the jury an indication of what jobs and roles, role functions that you've had in [184] State Farm, say, in the first ten years that you were employed.

A From 1965 until 1968 I was a field claim representative in Richmond, Virginia, and handled kind of the middle part of the state.

In 1968 I was promoted to claim superintendent, and went up to the Washington, D.C. area, an area that has been referred to as northern Virginia. I was there for two years, until 1970, and I became what is called a divisional claim superintendent back in Charlottesville, Virginia. And then in 1973, I became an assistant division manager, and then later that same year, I believe, a division manager.

Q We're going to be talking about the organization of State Farm, and so I'd like to just stop at this point, where you have indicated that in this year of '73 you were an assistant, and then a division manager, and I'd like to just explain, have you explain, and help me as I walk through some questions, on what the organization of State Farm is.

Now, as a regional vice president -- Is State Farm, as a company, divided up into regions?

A There are twenty-eight regional vice presidents like myself, that operate in what we might refer to as a confederacy. We operate within a loose [185] structure of general guidelines that we get out of Bloomington, Illinois, and within those twenty-eight regions we make our own decisions about how those operations take place.

Q And within a region, where you've indicated that the RVP is the head of, or as this jury may understand, the chief executive officer of the region, below the RVP, under today's vernacular, is called a vice president of operations. Is that correct?

A That would be correct, the vice president of operations. And the region which I work, there are two vice presidents of agency that are on an equal level with the vice president of operations.

Q Now, this position used to be called a deputy regional vice president.

A That is correct.

Q All right. Now, under the level of a vice president of operations, do you then get to the area that you told the jury that you had the function of in 1973 as a division manager?

A That's right, the division managers report to the vice president of operations.

Q Now, let's take, for example, this region, which is called Mountain States; is that right?

A That would be correct.

[186] Q In this region, if we were to write over here the state of Utah -- and I realize this is small writing -- is there a division manager for the state of Utah?

A Yes, there is, his name is Duane Farrington.

Q So Mr. Farrington, or D. F. is the division manager for the state of Utah.

A That's right.

Q And if we were to take the state of Colorado, is there more than one division manager in Colorado?

A We have two division managers in Colorado.

Q All right. And how about for the state of Wyoming?

A Wyoming and Utah would be together.

Q So Mr. Farrington --

A Farrington.

Q -- is the division manager for Utah and Wyoming. Now, the jury's heard some testimony, at the level of the region there is some common oversight, or functioning in your office on behalf of more than just the auto company; is that correct?

A The regional vice president's level is the first point within the organization, other than some of the operations functions, where all of the activities that take place within a region come together.

Q Okay. And these activities, if we were to [187] draw out to the side of your name, or your title, do you supervise the fire company activities in the Mountain States Region?

A I would look after fire company, along with all of the other functions.

Q And so would that include life --

A Health.

Q And the health companies?

A As well as the auto company, that is my employer.

* * *

[188] * * *

Q Now, with respect to the organization, Mr. Moskalski, if we move down below these operations -- And I'm getting ahead of myself just a little bit. Where are all of these people located physically? In this region?

A Down to this point, all of those folks are located in the regional office in Greeley, Colorado.

Q If we take the state of Utah that Mr. Farrington is the division manager of, how many claims operations, or units in the state of Utah does he supervise?

A He looks after two, what we call claims sections, one of which carries over into the state of Wyoming.

Q Now, when you call a section, this jury has obviously heard some testimony about what a divisional [189] claim superintendent is, and Mr. Kingman has testified and indicated that he is a divisional claim superintendent, officing in Centerville, and that he supervises Wyoming and northern Utah. Is he a section leader, as well?

A Yes, he would be called, that operation that is under a divisional claim superintendent is called a claim section. And so we're talking about the same thing.

Q And then the other claim section that Mr. Farrington would supervise, where is that located?

A That's in the rest of Utah.

Q All right. So would that be from basically southern Davis County, south?

A All the way south to the border of Utah.

Q So Salt Lake City, south.

A Uh-huh.

Q And the jury will hear from the person who is the divisional claim superintendent for that section or division later in the case, and that's Mike Arnold; is that correct?

A That's correct.

Q All right. Now, I want to go back to Mr. Farrington for a moment, as we talk about the makeup of this insurance operation that you head up.

[190] Mr. Farrington, as a division manager, does he have direct handling and supervision of claims?

A No, he really doesn't have, within the structure that we have, any kind of authority in terms of claims. He has divisional claim superintendents who report to him, but he also oversees the underwriting function and that function within the regional office that issues policies and takes care of the servicing of policy holders.

Q Okay. Can you tell the jury what it means to have an underwriting function, just in lay person's terms?

A Well, as you know, you've probably been into an agent's office somewhere, and you've filled out an application on your automobile. That has to go through a process, in that it has to be sent to a regional office somewhere, or to an office, for whatever insurance carrier it may be.

At that point in time there are people who are called underwriters, who sit down, take a look at the application to make sure it's complete, that it has the information on it they need in order to rate it. Then the policy is rated by the underwriter, and then that is sent on over to another function that's called service, that deals with the actual issuance of the [191] policy.

Q Okay. So in creating a policy arrangement, the underwriting step is first?

A That would be correct.

Q And the second step, I think you just indicated, is what?

A Is the servicing function, which is where the issuance of the policy takes place. That, that comes to your home a couple of weeks later.

Q All right. And the third step that a person may become involved in if they have a policy, is a claim, if they need to make one, or they receive one against them; is that right?

A That's right.

Q Now, in terms of the stage that creates income for the business, can you tell us at what stage income is produced for the region's business?

A The income part of the business is at stage 1 and 2, that's where the pricing takes place, that's where the bills are determined and sent out, and that is the income side of the equation.

Q Okay. When you talked about the fact that Mr. Farrington does not have dollar authority, this jury's heard about the fact that adjusters have a certain level of dollar authority, and claims [192] superintendents have a little more, and divisionals have a little more. Does Mr. Farrington have dollar authority on files?

A No, division managers don't have dollar authority. They only supervise the divisional claims superintendent, and they may occasionally sit in on a meeting where a claim is discussed, but they don't have any specific authority.

Q So this person, Mr. Farrington, that's located in Greeley, as he is in charge of the operations of underwriting service and in supervising this function, he is in charge of all of those functions, which would include -- Well, would it include the sales force, the agents, as well?

A No, the only functions that come together at the division manager level are underwriting, service, and claims. The functions of sales are completely separate, and don't come together until it reaches my level.

Q All right. I'd like to talk about, we've discussed the setup and a brief outline of the region. I'd like the jury to understand a little bit more about what is an RVP, and what your responsibilities are. As an RVP, do you have the right to direct the operations, the underwriting, the sales and claims in this region, [193] Mountain States?

A There's no question about it, that's a responsibility that I'm given when the board of directors appoints me as a chief executive officer, here, and it's a responsibility that I'm accountable for during and at the end of the year.

Q Now, in the course of your reporting, who do you report to, Mr. Moskalski?

A I report to the president of the company and the board of directors.

Q And that, in this company, is Mr. Rust, Junior?

A Ed Rust, Junior would be the chief executive officer in corporate, and he and I both report to the board of directors.

Q As this jury listens to the testimony from you and other witnesses, is there anybody higher in the State Farm organization responsible for the claims that happen here in Utah, directly responsible, than you, Mr. Moskalski?

A No, I have the total responsibility for how the claim operation takes place. Everything that operates within these three states, outside of the broad general guidelines that I talked about earlier, happens to be my responsibility.

[194] Q Ultimately are you responsible for the income and expenses in this region?

A Yes, I am. As we sit down each year and try to project, just like you do with a budget, you try to project what your income is going to be and what your expenses are, you project

them out for a year, and that puts the responsibility squarely within the executive office within each region.

* * *

[195] * * *

Q Now, let me jump ahead, Mr. Moskalski, and talk about claims in this region. With respect to the fire company and the handling of claims in this region, [196] does the fire company have a separate claims force from the auto claims force?

A The claims forces are entirely separate. The fire claims and the auto claims force has their own procedures, they have their own training materials, they have their own systems that support the claims organization, so they're completely separate. They handle different types of policies, and everything is unique to the individual company.

Q Now, there's been some testimony to the jury that the fire company issues a higher risk policy, if you don't qualify to get into the mutual company, you can buy what's known as a standard policy. And who issues that?

A That particular policy is issued by the fire company. But when a claim occurs, it is handled by, because it's an another policy, it's handled by an automobile adjuster.

Q Is there charging back in the organization for that function, Mr. Moskalski?

A It would be my understanding that there is.

Q All right. Mr. Moskalski, with respect to the reporting that you talked about that you report to the president and to the board of directors, do you, in your function, when you indicated you are the person, [197] the highest person that makes decisions about claims in this region, do you call the president's office to get permission to handle claims, or to make decisions on claims, or claim practices that need to be made in your region?

A I'm thinking back over the years that I've been a regional vice president, and I think the only telephone call that I've ever

had to the president of the company had to do with a social occasion. I think I wished him merry Christmas one time.

Q How long have you been a regional vice president?

A Since August of 1989.

Q If there is a claim practice, or a claim problem in this region that needs to be addressed, Mr. Moskalski, can you tell this jury -- and we're going to get into this in more detail--but can you tell this jury how that would be handled up through the chain of command to your office? Just briefly, and we'll talk about this in more detail later.

A Basically if it's a problem that I would become aware of, say, by way of a complaint call or something to my office, then I would work through the vice president of operations, he, through a division manager to a divisional claim superintendent, through a [198] claim superintendent, so that we have those levels of involvement to make sure that whatever the problem is, does get adequately resolved.

The opposite would be true when the problem originates at the lowest level, say, at the supervisor's level. Then that, again, would go up through the chain, and it involves a number of people checking and double checking the decisions that were made at the lower level.

Q Now, this jury's heard some testimony from the plaintiff's experts that they have agreed with when I've asked them questions, if they would agree that State Farm handles approximately 14 million separate claims a year. Have you heard numbers that are similar to that in size, as a total operation?

A I've heard those numbers. I've obviously become more well acquainted with my own numbers.

Q Okay. In terms of the numbers in your region, or this Mountain States Region, approximately how many claims are handled a year in the Mountain States Region?

A My memory is that the latest figures I have for a year in my mind, we handled over 414,000 claims in the three states last year.

Q So approximately 14 million nationwide, [199] 414,000 of those annually in this region. You've indicated that you handle ultimately with yourself or within your claims organization, claims issues. Can you tell the jury why, if there is a reason, Mr. Moskalski, why you don't pick up the phone and discuss claims on a regular basis with Mr. Rust.

A The reason I don't discuss it with Mr. Rust is, it's my responsibility. If something goes wrong, it's mine. I don't need to call Mr. Rust and say, "Hey, I've got a problem."

Because his response is going to be, "You're the regional vice president, you need to handle it."

Q I want to talk to you, Mr. Moskalski, about what this jury has heard testimony about that is known as the PP&R program. I assume you're familiar with those?

A Yes, I am.

Q That acronym? First of all, were you with the company before 1979, when the program, the PP&R program was instituted?

A Yes. My memory is that we, even before the performance, planning and review program that you referenced, we had a program that was called development guide that we utilized.

Q And looking back on that program before 1979, [200] and then having lived with the PP&R program as it's evolved over the years, can you tell the jury if there were some reasons that you observed, as a manager, why the PP&R program came into being, as you understood it.

A Well, the development guide, it goes back many years, was more geared toward looking at individual employees in terms of their development, kind of educationally. And it didn't really deal with those things that we normally associate with management by objectives, now.

Employees began telling us, "I'm really not interested in hearing about my developmental activities. I really want to know what's expected of me as an employee, how I'm doing every

year, and I want to have an objective basis by which you measure me at the end of the year."

And so the performance, planning and review process picked up on those management by objective principles, and that's what the program was when it was first introduced.

Q And how does the company handle the educational side, or the training of employees, separate from the PP&R program? And maybe that's not a good question, but what I'm asking is, are there classes and courses and other programs available to train your [201] employees?

A Obviously there are really two types. The primary one deals with separation. For example, fire claims people are trained in fire claims school. Auto claims people are trained in an auto claims school. And to the extent that there's no commonality in the functions, they stay within those areas of training.

The only time that they come together has to do with maybe, if there's a general sort of course that's being offered, like managing time, then that can be taught, regardless of what company you work in. Those kind of things would be in common.

Q And in addition to the fact that the companies have different training programs, just generally, Mr. Moskalski, when the company evolved from the development guide era, pre-'79, did it give up the focus of training employees?

A Oh, not at all. That was still very much a part of it. It took the development part of the employees, in other words their own personal development as an individual, but combined it with an objective setting process that a lot of people could be evaluated.

Q Mr. Moskalski, I'm going to put up on the overhead just a couple of things, and before I -- Well, as I turn it on, I just want to give some background to [202] the jury. And I'll represent to you, since I don't have the manual in front of you, are you aware that when the PP&R program came out in 1979, that there was a manual produced with it?

A Yes, I am. It was a training manual to introduce people to the new concepts.

Q And did that program evolve, and another training manual get produced in about '87? This jury's got it in evidence.

A Yes. Yes, it did.

Q And then was there further evolution of the program with another stage, or manual, in 1992?

A That is also true, and it tends to be part of the overall process with all of the documents that we utilize at State Farm.

Q Okay.

* * *

Q (BY MR. BELNAP) What I have up on the board, Mr. Moskalski, is I've marked as Exhibit 142, and let me just hand you this, and I'll represent that those are [203] some pages from the 1992 manual that has been shown to some of the witnesses up to this point.

Now, with respect to this "Note to training administrator," I want to reference you to the first paragraph that says, "You have an important role in ensuring that the participants in the performance, planning and review receive the most current information on the PP&R process. Since various aspects of the PP&R may change from time to time, a portion of the information included in this program may need to be updated occasionally."

Do you see where I've read from?

A Yes, I do.

Q Now, are you aware, Mr. Moskalski, that there has been any changes in this program as it's evolved since 1979, with respect to--let me be specific, so that I'm not just being ambiguous--with respect to cost goals?

A Yes. Yes, there have been revisions. As we started out, as I recall the original author of the document had gone out into the field and asked people, "Tell me what kind of goals you would set for different job classes."

And based upon that input there were some specific references to goals in the initial document, [204] and then that became evolving in terms of the two other revisions, with the 1992 revision completely taking those kinds of goals out of the process.

MR. BELNAP: I'd move to admit 142, Your Honor.

THE COURT: Any objection?

MR. HUMPHERYS: None, Your Honor.

THE COURT: Received.

(WHEREUPON Exhibit Number 142 was received into evidence.)

Q (BY MR. BELNAP) Mr. Moskalski, turning to the second page of Exhibit 142, "What to avoid," is there a statement on this document at the bottom that indicates, "Goals which affect policy costs are inappropriate and not within the broad control of employees. The State Farm philosophy is to pay every penny owed, but not a penny more."

A That would be a definitive statement of the decision that was made to take those kind of average paid cost goals out of the process for claim handlers.

Q Now, if that message -- And let me just, before I move on, the last two pages of 142 consist of a case study, do they not?

A Yes, that's right.

Q All right, where a claim representative [205] indicates that, "I'm going to have a goal to reduce payments by 10 percent by the end of the year in order to help expenses."

And in the case study in the manual, it indicates, does it not, that this is not an appropriate goal, that there's other ways that are appropriate to approach this.

A That's right. It was a reflection of the discussion that took place between the claim handler and the supervisor, and the claim handler offered the goal, and the claim supervisor said, "That's an outcome-based goal and those aren't appropriate."

Q Okay. Are you aware, Mr. Moskalski, if this statement, Exhibit 142, has been reinforced by any statements from a gentleman by the name of Frank Haines?

A Mr. Haines, in conjunction with another gentleman by the name of John Coffey, issued a memorandum to regional vice presidents, as I recall, in maybe 1993, reiterating this position, that these kinds of goals, outcome-based goals are not appropriate for claim handlers, as well as claim management people.

* * *

[206] * * *

Q (BY MR. BELNAP) And with respect to what I've put up on the overhead, which is a memo to regional vice presidents, from Mr. Haines and Mr. Coffey, can you tell the jury what this memo deals with, Mr. Moskalski? Specifically referencing, and it's maybe not easy to read this --

A If you look down the second paragraph from the bottom, specifically talks about the fact that they reference, "Fifty-eight categories in the form relate to, specifically to claim statistics. It is inappropriate for either the claims representative or claims management to include reduction of claim indemnity costs, pendings, or expenses as a goal, or a measure of job performance."

Q All right. And Mr. Moskalski, the bottom paragraph indicates that a revised PP&R form, including editorial changes, will be coming out, does it not?

A Yes, it does.

Q Let me show you what's been admitted into [207] evidence as Exhibit 138-D, and ask you if you can identify what that document is. Is that a blank of a PP&R form?

A What it is, is the form that's used. There are about five or six different speciality forms of the PP&R, this one is one that is utilized for claim representatives.

Q And that would be for a person who's directly meeting with the public and handling their claims; is that correct?

A That would be correct.

Q Now I'd like to refer you to the first page of this exhibit, which, would this be called the instructional page that would be used by the supervisor, and referred to by the claim rep when they're filling this out?

A That's right, it has time lines and tells you what goes into different columns.

Q Could you please read to the jury what it says in the middle of this first instructional page on Exhibit 138-D.

A In large black letters after the introduction it says, "Reduction of claim indemnity costs, pendings, or expenses should not be included as a goal, a measure of job performance, or as a condition for promotion or [208] merit pay increase."

Q Just for the record, Mr. Moskalski, the Haines memo that we just had up on the overhead is Exhibit 128, and I'm not trying to give you a test, I'm just trying to tie things up.

A Okay.

Q Now, what you've just read to the jury on Exhibit 138 is that the document that I've put up on the board for the jury to see on the overhead?

A Yes, it is.

Q Now, down at the bottom of this document, it was cut off on the overhead that I had, can you tell the jury when this was revised? It's small print.

A This was revised in January of 1995.

Q Okay. Now I want to move into a little bit different area, Mr. Moskalski, but also related to the PP&R program. State Farm has produced in this case what counsel and I would refer to as some national PP&Rs. It's PP&Rs from several different states across the country, and these are PP&Rs of division managers in those states. Are you aware of this?

A You mean have I seen them?

Q Well, are you just generally aware that we've done that?

A I'm generally aware, yes.

[209] Q Okay. Now, once again, as we talk about a division manager, we are talking about a person like Mr. Duane Farrington, who is officed in Greeley; is that right?

A That's right.

Q And who is in charge of underwriting, service, and then supervises a section. Is that correct?

A That's correct.

Q All right. Now, as a division manager, is that person responsible in the company for both income and expenses?

A That's the first level within the organization where those functions do meet with one person, yes.

Q All right. At the claim level, down in these sections, are there a number of offices, for instance, Centerville, Logan, and Wyoming offices?

A Yes. The divisional claims superintendents tend to supervise anywhere from, oh, ninety employees to 150.

Q And in those offices, those claim offices, is that where the claims are actually being handled and managed?

A That would be correct, yes.

[210] Q All right. Now, the jury has seen the 1992 PP&R booklet, they've seen the 1994 Haines memo, and they've seen Exhibit 138, the form used for claim representatives. Let me represent to you that Mr. Humpherys a few days ago, with Mr. Fye, put up some examples, in Mr. Fye's opinion, of the fact that allegedly State Farm was not following this revision in the program.

Now, I'll represent to you, this is Bates number 3982, and I'll represent to you that this is a goal from a division manager in the Buckeye division. Can you see that, Mr. Moskalski?

A Yes, I can.

Q Now, does this goal of the division manager state that he is going to, first of all, continue, "We continue to use our mission

statement to judge performance. I am personally accountable for providing prompt, accurate, friendly, and cost-effective services to our customers." Have I read that correctly?

A Yes, I have.

Q And secondly, "We will achieve a 3 percent operating profit in the Buckeye division." Do you see where I've read that?

A Yes, I do.

Q Now, can you explain to the jury whether or [211] not that goal for a division manager, who is responsible for underwriting, service, and supervising a section, whether that's an appropriate goal, by your understanding of the State Farm program as set out in the PP&R of 1992 book, and the 1994 Haines and Coffey memo?

A It would be my understanding from all of those memos, all of those revisions, based upon my personal experience, that that's an entirely appropriate goal for a division manager, who has all of those responsibilities directly underneath him or her.

Q Okay. Now, I don't want to belabor this, Mr. Moskalski, but I want to make sure that we're tracking together, and that this jury understands what the difference is, and the basis for that testimony that you've given. If we're saying, as a company, that the program has evolved, and a claim representative, or at the claims handling level should not have these outcome-based goals, why is it appropriate, in your opinion, to have a division manager have that kind of a goal? If you could give us just a common, ordinary example. If not, explain it in your own words.

A Well, it's kind of like your own personal budget, I suppose. That you plan your expenses, you plan how much income you're going to have, and whether [212] or not you're going to make the two of those meet. And an operating goal would have that kind of applicability to an individual. You have to determine, "Am I going to have anything left over at the end of the year to save? To put into a savings account for retirement?" For example.

Q When Mr. Haines has indicated, consistent with the PP&R form, that these goals are inappropriate for claims representatives or management to include, would a division manager in the State Farm organization be deemed to be claims management, quote-unquote?

A No, they are not claims management, they are division managers, an entirely separate function.

* * *

[213] * * *

Q And supervising and working with all of these operations, do you have a responsibility to the policy holders of this region to try and be profitable in the Mountain States Region?

A Yes, I do. As a matter of fact, one of the responsibilities that I have that is so great is that particular one, because, unlike a lot of businesses, those policy holders, just as you get to vote for your insurance every six months if it's an automobile, they can decide whether or not they want to do business with State Farm at the end of that six-month period. And that is a very powerful sort of vote that they have.

Q Do you deem that you have a responsibility to, not only the policy holders, but to your employees, and everyone else, to have a product that's affordable, and that meets the needs of the people that you're selling it to?

A I guess the best way that I can capture that is the focus that we've had in the region, and that has been that we want to offer the best combination of products, price, service, and then all of that under an umbrella of financial stability.

[214] * * *

Q With respect to this overhead that I had on the board, that I've buried in my book somewhere, I want to ask you if, in paragraph number 3, if I can refer you to that, "Expense management will continue as a strong focus based on cost PIF." What does that mean?

A Per policy in force.

Q Is that an appropriate concern for a division manager to have, Mr. Moskalski, along with talking about operating profit in your understanding, as you've stated to this jury?

A This, I would call the cost of doing business, that all businesses have. The buildings, the electricity, all those things that you have to have in order to get up and running. And we look at those costs [215] and try to determine how we can be most efficient in utilizing them.

Q All right. I want to move to another example that Mr. Fye referred this jury to, and that would be -- Counsel, I've referring to Bates number 3986. I'll represent to you, Mr. Moskalski, I'll show you the full PP&R from this person, and ask you if you can tell the jury if this person is a division manager, once again.

A Yes, he is.

* * *

[216] * * *

Q (BY MR. BELNAP) Does -- Have you looked at the PP&R?

A I'm down to the last page, the last two pages.

Q Okay. Is there any statement in here about average paid cost?

A I didn't see any, no.

Q Is there any statement in the document about a requirement, or a practice that, in your opinion, would be contrary to the '82, or excuse me, the '92 and the '94 statements that we've shown the jury?

A Nothing whatsoever.

Q Under development -- And let me show you where that is, Mr. Moskalski.

A I have it on page -- I have that heading.

[217] Q Can you just summarize --

MR. BELNAP: And that, counsel, is 3987, the page on that.

Q (BY MR. BELNAP) Could you just summarize, so that we can move with a little quicker dispatch than I'm moving -- and I apologize -- if that statement talks about wanting to mentor employees and pursue affirmative action and other appropriate educational functions?

A Very much so. He lays that out as a goal.

Q And on the second paragraph, can you tell the jury what this particular division manager would like to see in terms of a team concept in terms of, "How can I help?"

A Basically he talks about some of the principles that are part of the team management approach, and that is team participation, team rewards, team input.

Q Does the PP&R in several places emphasize various ways that they are trying to enhance customer service and customer satisfaction, Mr. Moskalski?

A He has several items, it appears. I see six, six right away.

Q Let me move to another area that was another PP&R that Mr. Fye specifically referred this jury to, talking about this same subject matter.

[218] MR. HUMPHERYS: What's the Bates stamp?

MR. BELNAP: Bates stamp, counsel, 4071.

Q (BY MR. BELNAP) And let me hand you this PP&R, if I could, Mr. Moskalski, the full copy of it, and ask you once again, is this a PP&R of a division manager?

A Yes, it is.

Q Of what's called the Erie Division?

A Yes.

Q And Mr. Fye had referred to Bates stamp number 4071 that we have on the board. And I'd like to ask you some questions about this.

First of all, this talks about a 10-point Eire loss ratio reduction plan that will be completed on a timely basis with focused goals,

reviewed with management. And then it talks about the project/ goals. First of all, loss ratio reduction plan. "The DCS --" And that is a divisional claim superintendent like Mr. Kingman; is that right?

A That's right.

Q That's not the division manager.

A No, that's the divisional claim superintendent.

Q " --will work to reduce the loss ratio of the division by applying the following programs. One, [219] enforce proactive handling of Lowe impact/soft tissue injury claims. Number 2, increase use of comparative negligence. Number 3, enhance accountability of employees. Number 4, improve total loss negotiations. Number 5, aggressively apply article 6, 'Estimatics and reinspections.' Number 6, focus on better subrogation results. Number 7, improve salvage return results."

Now, there may be some words in there that aren't common to people like myself and the jurors, and I'd like to just briefly talk about those.

In terms of proactive handling of claims, I realize you didn't write this, you didn't supervise the Erie Region, but can you tell me if you have an understanding of what it would mean to pro actively handle a claim in such a way that it might affect a region's costs?

A To me it would be interpreted as getting out there and making a prompt contact to let the party know we're there, that we're insured. If it happens to be a tort feasor, to assist in the accumulation of medical bills, to expedite the process so that the money can, if there is going to be a settlement, can be paid to the claimant at the earliest moment.

Q Okay. And what about -- Let's move down, I think the jury understands negligence and [220] accountability. How about total loss negotiations? Is that a property damage item?

A Yes, it would be.

Q Okay. How about estimatics and reinspections? What does that mean, Mr. Moskalski?

A Basically this is the program that we're in, we go out into the field and reinspect those activities for a number of reasons. For example, cars reinspected to be sure that the repairs have been properly made and that the car is safe for operation by the claimant or the insured, and that would be a function of that program.

Q Subrogation results, is that trying to collect -- Well, let me rephrase it. In a subrogation situation, are you attempting to collect back money that has been paid out on behalf of a policy holder from someone else who may be responsible?

A That would be correct.

Q Is there anything wrong with that in the industry, as you understand it?

A That's just a standard operating procedure where you pay under a coverage, and you have a fault system, you're entitled to recover back the payment that you've made, just as your insured would. You step into the shoes of your insured, is what happens.

[221] Q Now, improve salvage return. What does that mean?

A That means, that's an efficiency measurement. And as a car's totalled out, that crunched up piece that's left is called salvage, and it has a value. And it means that we need to expedite the handling of that so that the value of the salvage is not eaten up by storage or towing and those kinds of things, and that we handle that salvage in the most efficient way.

Q Having stated those goals, does this division manager then go through a number of paragraphs where it's talked about how those things are going to be accomplished?

A Yes, he does.

Q Okay. I'd like to just touch on that. "Complete a detailed review analysis and evaluation of property damage issues to

establish a plan to eliminate unnecessary costs. All employees will be empowered to contribute to improve efficiency, meet higher customer expectations for service, and ensure we pay only what we owe." Do you see a problem with that?

A None whatsoever. It's an analysis of what their particular situation is, and it lays an outline for how they're going to deal with it.

Q "Secondly, a comprehensive enrichment [222] program. A special training program will be developed for all trainees to be taught, evaluated, and prepared for their claim representative role in a consistent manner." Does this company that you represent, Mr. Moskalski, attempt, in good faith, to train your people that are handling claims?

A We like to say that school's never out at State Farm. It's an ongoing process. I've been in the business for thirty-one years, and I'm still going to school.

Q Next, "Consistent and effective salvage procedures project." You've talked to the jury about that.

"Loran team experiment. Continued emphasis and evaluation of the benefits of the team concept for BI/PD files will be reviewed through the Loran experiment." I'm not sure I know what he's talking about there, do you?

A I suspect that what he's done is, as is consistent with what we talked about earlier, that the region has the authority to carry out the activities within that particular geographic area. What he has set up is a, you might call it a pilot program, an experimental program to combine the bodily injury and property damage function into maybe one unit.

[223] Q Okay. Do you see, Mr. Moskalski, any, is there anything inconsistent with the '92 booklet and the '94 memorandum for a division manager to have those goals that have been referred to by Mr. Fye?

A No, he set us out an awareness of what he wants to do, and then he goes through and identifies activities that are going to lead to that result. It's a very logical sort of approach.

Q It's been claimed by Mr. Prater that -- Let me just represent to you, if I might, that he said two different things. On the one hand, in part of his testimony that I heard, and the jury will judge it for themselves, that State Farm does not have proper training materials. On the other hand, he has testified that they have proper training materials, but they're really just a guise to continue doing their same old improper practices.

And I want to ask you, Mr. Moskalski, is there anything that you know of, as the regional vice president in Mountain States, that this region is doing contrary, at this point, to the bona fide statements in the '92 manual and the '94 memo?

MR. CHRISTENSEN: Objection, leading.

MR. BELNAP: I don't think it is, Your Honor.

THE COURT: I'll allow him to answer that [224] question. Overruled.

THE WITNESS: I know of no process, no function, no activity within the Mountain States regions, that's contrary to those items that you talked about.

Q (BY MR. BELNAP) Now, the last thing that was put up on a nationwide basis by Mr. Fye was Bates number 4075, "Schedule and complete visit to the Ohio Region, work with team management and employees to develop professional attitude and approach to their responsibilities." Do you see anything wrong with any of the statements on this?

A No, I don't.

* * *

Q (BY MR. BELNAP) Let me show you, and ask you, Mr. Moskalski, if this is, once again, a set of goals for a division manager in the Dallas Metro Division.

A I can't be sure, because it doesn't have a title on it.

Q Okay. Let me represent to you that all of [225] these were from division managers, and if we need to check to verify that, we can do so. But for purposes of these questions, I want you to assume that this is, once again, a division manager from the Dallas Metro Division.

A Okay.

Q This person refers to managing for quality, the underwriting staff will continue participation and input --

A I'm sorry, counsel, is that a --

Q I'm sorry. I've jumped ahead a couple of pages, to Bates number 4700.

A Okay, I have it. Thank you.

Q Excuse me. "Managing for quality. The underwriting staff will continue participation and input into the Managing for Quality Program." Is that a program that you're familiar with?

A Yes, I am.

Q And it talks about agency contacts will be continued, and then it drops down in a subparagraph and says, "Emphasis will be on an attainment of a 3 percent adjusted operating profit, that we have continued to emphasize and strive for through underwriting, re underwriting, and cost reduction." What is the "Managing for Quality Program"?

[226] A Basically it's a program within each of the twenty-eight regions that allows us to sit down with individual agents and talk about the quality of the book of business that they have, and the quality of the book of business that they're writing, and to develop a plan to continue to improve that book of business.

Q And when this particular division manager, as you look at the goals, there, does that key you into whether or not we're talking about a division manager, since he's working with agents?

A It would do that, as well as right from the start, which is an underwriting program, Managing for Quality, all of those are division manager type activities.

Q Those are not activities Mr. Kingman would be involved in at a claims operation?

A No, they're not.

Q All right. Given that statement, Mr. Moskalski, is there anything improper that you have seen in those goals with respect to the 1992-'94 pronouncements that we've talked about?

A Everything that I read seems to be in complete compliance with it.

* * *

[Vol. 21, R. 10276, commencing at p. 4]

* * *

ELTON "BUCK" MOSKALSKI the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION BY MR. BELNAP:

* * *

Q Mr. Moskalski, yesterday when we ended the session in the afternoon, we were talking about the PP&R program, and I want to pick up from there and continue on a different facet of that this morning. And that is, this jury has heard reference to the president's plan, or the president's forecast. Are we communicating on --

A Yes, we are.

Q All right. And I want to talk about the process of the creation of what's known as a regional plan. And just to be basic, and then build from there, [5] can you tell the jury what a regional plan is, when we talk about that?

A That is probably best described, in terms of the process of the president's forecast or president's plan, is communicating, usually we get the president's letter in like July of each year. And as a result of that letter, he talks about the market conditions as he sees them country wide.

And we take that basic document, and we go off to a planning session in August, and sit down with our staffs, and over about a

five-day period we plan our own regional plan that is then submitted to the president's office, usually in October, and then we finalize it for a final plan somewhere just before Thanksgiving.

Q Now, in terms of the regional plan, Mr. Moskalski, is this a document, as you've stated, that you and your staff create for the Mountain States Region?

A That's correct.

Q And does it cover basically all aspects of the business of running an insurance operation that you explained to the jury yesterday?

A It's basically, it is the PP&R, if you will, that I prepare for the region, and it could be viewed as [6] my PP&R.

Q Now, when you say your PP&R, you actually, do you actually fill out a PP&R form like this jury has seen with different individuals?

A No, this document itself really lays out the plans that we design for the region, and I've always viewed it as my PP&R.

Q Okay. And with respect to this regional plan, would it contain a discussion about operating costs, projection of income, those kind of things?

A It deals with all of that. Just as you would sit down and do your own budget, we project what the premium income is going to be, what all the outgo, the cost of operating, as well as the cost of handling claims, and all of that is factored into the overall plan.

Q Now, in terms of operating a business, like an insurance business, Mr. Moskalski, as a chief executive officer of this operation, do you have an opinion -- Let me phrase it a different way. Can you tell the jury whether or not, in your opinion, you believe you can operate a business without being able to forecast both income and expense?

A Well, that, quite honestly, just doesn't make any sense. Anybody who's in the business world knows [7] that you have to sit down and project what your income happens to be, and

what your outgo is going to be, and you have to determine whether or not there's going to be anything left over when all that process has taken place.

Q Now, with respect to this regional plan, is it created from receiving any input from people besides the executive office of the region?

A As I indicated, all of the staff members are with me, so that every department, every function is represented at that meeting in August. And they, in the process of getting ready for that particular meeting, have met with their staffs and gotten the necessary input, so that the plan is actually written by the people who are there at that meeting who have discussed the issues and have developed a plan to respond to those issues.

Q Now, we've talked yesterday about the fact that within the region there are division managers, of both fire and auto, and then we talked about Mr. Farrington, that supervises sections; is that correct?

A Claims sections, yes.

Q And he'd have Wyoming, Utah, and there's two sections in Utah.

[8] A That's right.

Q Now, with respect to these sections, and taking a person such as Mr. Craig Kingman, back here, who is a divisional claims superintendent, in the operation of the State Farm business, do you, as you sit at the regional office, are you able to divine, so to speak -- and I'm not trying to be cute, here -- but are you able to divine what expenses there may be that you'll have to consider for the operation of your business, or do you take input from the section or divisional offices?

A As I indicated, they get the input before they go off to that August meeting, so there has to be a flow, upward flow of information from people like a divisional claims superintendent, up to the division managers. So that when Duane Farrington and I are together in August, he can tell me, he's going to say, "Craig

Kingman's expenses in the various accounts that he has to budget are going to be this," so that we can factor that into the cost that we're going to have to project.

Q Now, I don't want to take the time to list these, but obviously here in the state of Utah, in our claims offices, there are common reoccurring expenses such as utilities, salaries, automobiles, office [9] supplies, telephone, et cetera, et cetera; is that a fair statement?

A That's right, those are the costs, the basic costs of operating a business.

Q Does Mr. Kingman attempt, in his ability, to project those costs?

A To the extent that he has control over things like, he obviously has to project salary, he has to project other costs of doing business in his operation.

Q Without projecting costs, Mr. Moskalski, is there a basis, if we were to say this box, here, is the product that you as a business are offering, which is an insurance policy, if you do not factor into this product expenses, is there any way that you have to determine what the cost of the product needs to be, to be able to deliver that to the customers?

A The cost of our product is the cost of that policy to our policy holders. And unless we know what those expenses are going to be, both in terms of the cost of doing business, as well as the money it takes to pay claims, and we have no idea about what price to put on the product we sell, which is that policy.

* * *

[14] * * *

Q Let me go back to something that I was talking to you about in terms of the regional plan, Mr. Moskalski. You have told us that you elicit and ask for input in terms of expenses that you have to be able to understand, to be able to create the plan and to ultimately price the product that's sold here in this region.

We talked to the jury yesterday about the fact that, with respect to the PP&R program, that as of '92, and then reinforced in '94, it was indicated that average paid cost, or indemnity reduction goals were not appropriate for claim representatives and claims people at the handling level. Do you recall that discussion?

A Yes, I do.

Q Now, how would you explain to the jury, if we are saying, as a company, that indemnity cost control goals are not appropriate in the PP&R, how would you explain to the jury the fact that you are asking [15] Mr. Kingman and others to be aware of the expenses and to provide you information about the expenses of the operation of the business? And I'm not making myself clear, perhaps, but how do you weigh those two and explain that we ask a divisional for input as to what his projected expenses are going to be--his or her--but yet we are not putting those as reduction goals on the PP&R? Could you explain that?

MR. CHRISTENSEN: Objection, leading.

THE COURT: I'll allow him to answer it. Overruled.

THE WITNESS: Well, obviously you have to do the projections in order to determine what your payout is going to be in those areas.

In terms of a claim representative, for example, the person who's got that face-to-face contact with the policy holder or claimant out there, they're in a position where they really can't control the outcome. You need to know what the outcome is in order to do your budget.

But our basic policy is, we want claims people handling those individual cases based upon the facts that exist in those cases, without concern for this budgetary item that's sitting out here.

Q (BY MR. BELNAP) So can you tell us, if, in [16] your opinion, it is appropriate, or inappropriate, for Mr. Kingman, or a claims superintendent, to have statistics that would show things about costs?

A It's entirely appropriate for him to have those statistics. He needs to know generally an awareness of what's happening within his operation, whether or not, when those cost projections were made, he's anywhere in the ball park, so that he can identify, perhaps, some individual things that may be going wrong in his unit.

It could be that he needs to devote some more attention into investigations or negotiations, or that we need to look at a program that will help give us a better handle on managing some costs. But it's an awareness that claim management people need to have.

Q Now, Mr. Moskalski, before the pronouncement in '92, and the '94 pronouncement, this jury's been told and been shown some PP&Rs where a claims superintendent, or some claim representatives from California or, I think it was California, had some goals to reduce indemnity payments. Some of them would say, "I'm going to attempt to hold the line," or, "I'm going to attempt to reduce by a certain percentage," or "I'm going to attempt to hold the increase to a certain percentage." Have you seen goals like that in the past?

[17] A Yes, I have.

Q In your understanding, in terms of what has been taught back in those days, when you might see these goals, can you tell the jury what your understanding of that was in terms of the impropriety or the propriety of doing that, if it was combined with some of the things that you talked about just a moment ago?

A As I recall, when we introduced that program early on, and it had those management by objective standards in it, and that you had to have things that were measurable, our intent with those goals was to make them awareness goals. The goal itself, sitting out there, reduce average paid costs, was intended -- or manage average paid costs, however it read -- was intended to make people aware of the fact that there are costs we need to manage.

But as we introduced the program, we explained to management folks, or at least I did, that they need to identify the activities underneath that goal that will lead to that result, i.e. managing costs.

For example, better investigations, better negotiations, schools that we could send people to, to make them better at their job, that might end up with that kind of result. But we always tried to tell them that you needed to identify the specific activities that [18] ought to be engaged in.

Q Can you tell us, Mr. Moskalski, from your understanding, having been through this process, and as an executive that came up through it, whether you know if it was ever the intention of State Farm, in the training and the use of that program, that a claim representative should reduce the payment on a particular claim by a fixed or percentage basis?

MR. CHRISTENSEN: I'm going to object to this. There's no foundation he can speak for the intent of the company. State Farm designated another witness, is it Mr. Callis, to do that?

MR. BELNAP: No.

MR. HUMPHERYS: Oh, yes, he was. He was the 30-B-6 --

MR. CHRISTENSEN: We're talking about 1979. He hasn't laid any foundation he can speak for the intent of the company in '79.

MR. BELNAP: I'd be happy to lay some more foundation.

THE COURT: Lay some foundation.

Q (BY MR. BELNAP) Mr. Moskalski, we talked about your background where you were a claim representative for three years, and then a claim superintendent, a divisional, and then a divisional [19] manager for approximately ten years, was it?

A Yes.

Q Up to 1983?

A Yes, 1983.

Q Okay. If I could take you from 1983, was there an occasion when you worked as an executive assistant in the corporate offices at State Farm in Bloomington?

A Yes, I was there from 1983 to 1985.

Q And then after working as an executive assistant in the corporate offices, did you become a deputy regional vice president, which is now called a vice president of operations?

A I became the deputy of, regional vice president in Austin, Texas, in 1985.

Q And how long were you in that position, approximately four years?

A Until August of '89.

Q And then since 1989 to the present, you've been a regional vice president in the Mountain States Region.

A That's correct.

Q Now, in connection with this work in the Mountain States Region, as a regional vice president, have you had occasion to meet with and associate with [20] other RVPs from the twenty-eight regions?

A Yes, I have.

Q And have you had occasion to associate with and to communicate with people in what's known as the president's office, and/or the board of directors?

A Yes, I have.

Q And that would be above the region. Is that right?

A That's correct.

Q In connection with that, have you been responsible for being aware of company programs, such as the PP&R program, and what the intention of the company was?

A As those kinds of programs are introduced, or modified, or changed, or updated, the material, in most cases, comes to the RVP first so that we're aware of upcoming changes. And so I was aware of the introduction of the PPR program, and both modifications that were made in it.

Q Okay. I would return, then, to my question, and I'll try and condense it, if you have it in mind that was objected to, and that is --

MR. CHRISTENSEN: Your Honor, I have the same objection. Could I ask a couple of voir dire questions?

THE COURT: You may.

[21] MR. CHRISTENSEN: Mr. Moskalski, you were not designated as a 30-B-6 witness to testify on this subject, were you?

THE WITNESS: I don't recall the designation, as such.

MR. CHRISTENSEN: And you didn't --

MR. BELNAP: Your Honor, I'd like to object to this. In his deposition Mr. Christensen took that, and he was advised that Mr. Moskalski was going to be a witness in this case, and he was going to be testifying as a regional vice president on multi-faceted issues.

He was designated as a 30-B-6 in one area, but Your Honor did not restrict the scope of that deposition, as you'll recall, and there was full field of questions. And so certainly there's been a foundation laid. Just because there may be another witness who has similar knowledge is irrelevant.

THE COURT: Are you through with voir dire?

MR. CHRISTENSEN: I'm not through, I got interrupted.

And I'm holding up the '79 PP&R booklet. You didn't help write this, did you?

THE WITNESS: No, I didn't help write it. I was part of the implementation of it.

MR. CHRISTENSEN: And State Farm has [22] designated someone else to speak to the corporate intent on the PP&R program, haven't they?

THE WITNESS: That's knowledge I don't have, counsel.

MR. CHRISTENSEN: And that person's not going to show up at this trial, are they?

THE WITNESS: I don't know.

MR. CHRISTENSEN: I don't think he can speak to the corporate intent, Your Honor.

THE COURT: Well, I'm going to allow him to give his understanding.

MR. BELNAP: Could I have a moment, Your Honor?

THE COURT: You may.

MR. BELNAP: Thank you, Judge.

Q (BY MR. BELNAP) Mr. Moskalski, the question, if I recall it correctly, was, can you tell this jury whether or not there was an intention in the implementation of the program that a claim representative would reduce any particular claim that was being adjusted?

A That was never the intent of the program. The intent of the program was to create awareness that that was an obligation we have to our policy holders to manage costs, but there was never any intent to reduce [23] the amount of money that would be paid to an individual claimant.

Q Now, there's been testimony in this case from some of the plaintiffs' experts, that State Farm engages in a practice where they will change a program, but the same old practice continues verbally.

Can you tell us, Mr. Moskalski, based on the same foundation that I asked you about, whether or not, by your understanding and experience, claims representatives and people in the field that are handling claims every day have been told, "Don't put that in your PP&R, but continue to reduce every claim by a certain percentage"?

MR. CHRISTENSEN: Again, I'm going to object to this witness speaking for the whole company.

THE COURT: I'll allow him to testify as to his understanding.

THE WITNESS: My understanding, based upon my experience in several regions, and most specifically the Mountain States Region, that absolutely not, that that's just not true. That's one of the reasons that our program dealt with, as we update

manuals and books, we obsoleted the old materials so that claims people, underwriters, whoever, were dealing with the most current information.

[24] MR. BELNAP: Your Honor, I just think the record ought to reflect, given the objections, that we provided counsel with a designation that indicated these areas would be covered by Mr. Moskalski, as well.

MR. CHRISTENSEN: Well, they did that after I took his deposition, and they designated him for much narrower issues than the designation filed just before trial. Frankly, I don't think that's fair.

MR. BELNAP: Well, fair, Your Honor, and whining about it -- We designated, based upon a request of the court to do so at a given time. There was no suggestion that we did that after the deposition for some ulterior purpose. Your Honor requested both sides do that.

MR. CHRISTENSEN: But it was done after it was too late for me to do anything about it.

THE COURT: Let's proceed with the examination.

MR. CHRISTENSEN: May 31st.

MR. HUMPHERYS: A few days before trial is when they designated this issue.

MR. BELNAP: Was that in response -- Never mind.

Q (BY MR. BELNAP) Mr. Moskalski, with respect to expenses, if Mr. Kingman, for example, has projected [25] expenses to operate his section, if his budget of expenses does not turn out to be correct, can you tell us what results occur, as a result of that?

A Much as you would your own budget, you look at it, and our divisionals, as well as our staff members, look at it on a quarterly basis, and they determine, "Are they under budget, on budget, or over budget?" For example if they're over budget, they look at, as to the reasons why, and make a determination as to why that occurred. And then that's usually the end of it.

Q This jury has seen some statistics through the course of this case, such as average costs in the company for the payment of indemnity dollars, or on insurance payments for the payment of claims. We've probably talked about this, but I just want to button up this area before we proceed. Can you tell us whether or not you believe that's inappropriate to track such statistics?

A Not at all. If you don't track it, it's like any other business, you don't know what's happening in your business. It just seems to make such logical sense to me. There's no other way you'd want to look at your business than to track it.

Q In terms of the average paid expense to [26] settle claims, can you tell us generally, if you have an understanding, whether those have increased over the years, or decreased?

A You can go back many, many years and look at it, and it's almost, for those of you who have worked on projections, it's almost a straight line projection. You'll have an occasional blip one way or another in those costs, but they tend to be a straight line projection in an upward manner.

Q As an insurance company, Mr. Moskalski, and particularly in this region which you operate and make decisions on, are there efforts that you're making that you could give the jury some examples on what you're doing to try and attempt to control costs to keep the product as affordable as possible?

And let me just give you an example, for quickness' sake, of what I'm talking about. In the state of Colorado, is there a program that you've adopted that has yielded some cost savings to policy holders?

A Yes. And that's an ongoing process with us over in Colorado, under the PIP coverage that, your same coverage that you're familiar with here.

Q Let me just interrupt you, and excuse me.

A I'm sorry.

[27] Q This jury's heard about the words PIP and no-fault, and they may or may not understand what those are. What does this stand for?

A That stands for personal injury protection, and it has some variation from state to state, but overall that would be a personal injury protection.

Q Is that the same thing as -- Well, is that part of the no-fault coverage?

A Actually it was part of legislative attempts to get a handle on what were viewed as abuses within the tort system, and help alleviate some of the pressures on the cost of insurance.

Q And so when we use the words in this case, no-fault, does that mean that when these jurors have a policy that has this protection in it, it provides certain benefits to them, or other people, without who was at fault in the accident?

A That's correct, without having to make that determination. It's kind of like a hospitalization policy for your automobile.

Q Now, with respect to that coverage, what have you done in Colorado in an effort to control expenses that has been a positive thing?

A Well, one of the things we noticed was that there was this continuous upward spiral in the costs [28] associated with PIP, and it was right on the heels of a lot of HMO, managed care-type things that were emerging, where the medical industry and the medical societies recognized that there was a way to deliver medical services to all of us in a more efficient way.

And so we developed what was called a preferred provider organization, which allowed us to become part of a managed care network. And that was developed, and resulted in some pretty dramatic decreases in premium for the personal injury protection coverage.

Was part of your question to deal with other issues, as well?

Q No, I just wanted to make sure, as we move through, that that savings was passed on to policy holders.

A We projected a premium decrease, and as it turned out the reality of the experience was that we were able to substantiate that increase over a two or three-year period. I mean decrease over a two or three-year period.

Q Now, let me just move into another area that's related to that answer. I just briefly want to touch on this, but I asked Mr. Fye this question in my cross examination of him. But with respect to a mutual [29] company, which State Farm Mutual Automobile Company is; is that correct?

A That's correct.

Q When you have the benefit of a program like you discussed in Colorado that effects a savings in a mutual company, as opposed to a stock company, is that a way to then facilitate passing those savings on directly to the owners of the company, which are the policy holders?

A Basically that's it, and the mutual company has a dividend program where, as we take a look at what occurs financially within a state, and if it's justified that dividend program is implemented to return part of those premium dollars back to our policy holders.

Q Mr. Moskalski, I want to touch on the first PP&R program that was introduced just briefly, and I'll represent to you --

MR. BELNAP: Counsel, this is from the '79 book that I'm going to be putting up.

MR. CHRISTENSEN: Which page?

MR. BELNAP: I don't know which page that is.

Q (BY MR. BELNAP) With respect to this program that was introduced, Mr. Moskalski, it states that it was meant to be flexible in meeting the needs of changing organizational goals and priorities and [30] different styles of management.

Can you tell the jury how a PP&R is actually created, in terms of an employee -- And I'm trying to save some time and

jump through this, but does a manager write the goals down and then lay them out there, or how is it created? Can you quickly give us the process?

A Basically once a year the supervisor goes to the employee, and you may have experienced some of this yourself, and says, "Look, it's time to sit down and talk about next year, the next evaluation period. Charlie, I'd like for you to sit down and think about what you've been doing, your status at State Farm, and let's do some planning. You do some planning at home, I'll do some planning, and in two weeks we'll get back together."

They sit down in two weeks, and Charlie has his goals, and the manager, and there's a discussion that takes place, both as to job performance goals, as well as developmental goals. There's an agreement, it is then put into the written form of the performance planning and review document, and then there is a, either a quarterly or a three-time-a-year followup to see how those goals are progressing.

Q And in this process, Mr. Moskalski, was it the objective of the company that each person, in their [31] job, play an important role in establishing an increasingly strong position of service, growth, and profitability?

A In terms of the individual goals, yes. They're employees, they have a responsibility to the policy holders that we service to participate in that.

Q And with respect to the third paragraph, here, "Our employees mutually generate the productivity, efficiency and personal commitment for the corporate success which will shape our future." Was that an intent?

A Yes, it was.

Q "With respect to desires in working with employees, management must make a serious effort to help each employee succeed"?

A That's an obligation that we place very heavily on all of our management people.

Q All right. Now, with respect to some of the goals that were in this booklet, at the end of the booklet was there some sample goals in 1979?

A As I recall, there were.

Q Let me just use, for an example--this word may show up in one or more of the sample goals--but taking this one for instance, this is referencing a manager, or a department head; is that right?

[32] A That would be the manager, being a Duane Farrington over here --

Q So this is your division manager in Greeley that operates and supervises underwriting, service, and the sections.

A And the claims section. And then the department head over on the right would be somebody like an accounting manager, or a personnel department manager.

Q Okay. Let me refer you, here, to this sentence that says, "Establish realistic stretch goals." Have you heard that word before?

A That's part of the management by objectives concepts that we talked about earlier.

Q Now, can you use a lay example of what your understanding was intended within the company when it was being referenced that we were encouraging a, quote, "stretch goal," end of quote?

A Well, the whole idea behind management by objective was for employees to be able to do better as they developed in their careers. And an example, here, would be, let's take a new claim representative who, say, for the first year averaged handling ten property damage files or claims a week.

Well, they may talk about it and say to [33] stretch and to improve the productivity we have an obligation to do, maybe you want to handle fifteen property damage claims. And they would identify how they would develop this additional efficiency. But that would be the most simplistic one I can think of.

Q And not to be silly, but another example, if we were to use a home example, if we've had children that, say, come home with a C report card, have you ever experienced a stretch goal with your children?

A I think we've all done that, where we go back there and say, "Hey, Charlie, you got a C this time. How about next semester if we work for a B in algebra?"

* * *

[35] * * *

MR. HUMPHERYS: Counsel, is this the policy issued to the Campbells, or some policy exhibit that you've produced, not being issued to the parties?

MR. BELNAP: I have confirmed that this is the form that has the same language that would have been in force at the time of this accident with respect to property damage.

MR. HUMPHERYS: So this would be a similar form to the policy issued by the Campbells; is that what you're saying?

THE WITNESS: That's my understanding.

Q (BY MR. BELNAP) Referring to Exhibit 136-D --

[36] MR. BELNAP: And I should say, counsel, this is just a portion of the policy dealing with the physical damage coverages in this exhibit.

Q (BY MR. BELNAP) It talks about how to settle a loss, does it not?

A Yes, it does.

Q Does it talk about the right to settle on one of two bases, number one, to pay the actual cash value?

A That would be number one, and number two is to pay or repair the property or part with like kind and quality.

Q Now, when you talk about, in the insurance industry, paying up to actual cash value, does that come into play when you've had what's called a total loss?

A Typically that's what it would be. We insure different age cars. And obviously a 1976 Chevrolet is not worth what a 1994 Chevrolet would be, and so they have different values.

Q Now, if a car is repairable, and it can be repaired, does that, then, bring into play the second paragraph, to repair or replace the property or part with like kind and quality?

A Basically that's what it means. It means that if you have a 1976 Chevrolet, it would be entirely appropriate to put good quality 1976 parts on that car.

[37] Q All right. This jury has heard evidence about recycled or equivalent parts. Is that what you just referred to?

A Yes, it is.

Q This jury's heard evidence about after-market parts. Can you tell us whether or not State Farm uses after-market parts if they're available in an area?

A Those are just another form of new parts, and yes, we do use them.

Q Okay. And do those parts, to be able to be used, to be qualified to be used by State Farm, do they have to be certified?

A Yes, they do. There's an organization that has been established, and the initials for it are CAPA, I think it's Certified Automobile Parts Association, or something very similar to that. And that group certifies the quality of the quality replacement parts that we buy from people who are other than original equipment manufacturers. It's kind of like a Sears Die-hard Battery that we buy when we have to replace what was originally in the car.

Q Now, are you aware, Mr. Moskalski, whether or not, from studies you have read in the ordinary course of your business as an insurance executive, whether or not original equipment manufacturers, such as Ford or [38] Chevrolet or Chrysler, whatever, charge substantially more for parts than after-market part distributors that are CAPA certified?

A Yes, they do. And the difference tends to vary from year to year, but there almost always is a difference, with what you refer to as after-market parts, or quality replacement parts, being much less expensive.

Q Okay. Are you familiar with studies, Mr. Moskalski, that track what it would cost--let's see if I can get this where we can read it all--what it would cost to rebuild a Ford Taurus, for example, from the original equipment parts, if you were to buy all of those from Ford?

A Yes, we tend to see that, oh, about every year, and there's an update, as I recall, to that one that talks about a Chevrolet Lumina, and which the figures are even more dramatic.

Q And on this particular example, for a Ford, if you buy the parts from Ford, are you familiar with whether or not the study indicates that it would cost you $62,000 to rebuild that car?

A That's shown up at the right-hand top. $62,700. And I might add, the thing I've always found intriguing about that, is that doesn't count the labor [39] to put it together.

Q Now, as a company, Mr. Moskalski, if there were not some efforts made to try and use like kind and quality, or CAPA-certified parts, can you tell us if you have an understanding, if we had to simply use new parts on everything, what that would do to the cost of the policy?

A Well, obviously, as you look at individual parts and you recognize that there are some pretty dramatic differences in the cost of those parts, that if we didn't utilize them -- And as a matter of fact, we even feel so strongly about them that we warranty those parts for as long as you own your automobile. And you typically only get a one-year warranty on an original equipment manufactured part. But obviously the cost would be much more dramatic in terms of property damage and what we call the collision and comp coverages.

Q Now, part of Exhibit 136-D, attached to it are some what I'll call leaflets or brochures. Are you familiar with what I'm --

A Yes, I am.

Q Okay. Are these given to an insured when replacement parts, or recycled parts are used?

A Yes, that's the brochure that I referred to that contains our promise, our warranty on those parts.

[40] Q All right. So if an insured has a vehicle that's repaired with a recycled or a part from a salvage yard, does State Farm back that up?

A Yes, we do, for a year, or the manufacturer's warranty, whichever would be longer.

Q And with respect to an after-market part, are those backed up for the time the person owns the car?

A Exactly.

* * *

[49] * * *

Q I've put up on the board, here, a general claims memo that talks about statement of policy and the management of pendings. And I'd like to go over that. It's probably hard for you to read from where you are, but let me just go over a couple of points, there.

A I can see most of it.

Q Okay. In the second paragraph, it states, "The accomplishment of our pendings objectives will not be secured by a get tough policy or get rid of them at any cost policy." Is that your understanding of, as we move through this, Mr. Moskalski?

A That's absolutely true. You know, if you get tough they're not going to settle, and get rid at any cost doesn't make sense for policy holders.

Q "Each claim should be considered and evaluated on its merits, its settlement value should not be increased merely to reduce the total inventory of claims. All changes in settlement value should be supported and documented by good file investigation." Do you encourage that as a company?

A Very much so. That's part of the continuing, [50] ongoing evaluation process with claims, as there are changes, that our thinking needs to be adjusted.

Q Now, in terms of the claim that may be made in this case, that claim representatives have been forced in the past to reduce any particular claim, in the next paragraph, it talks about that, "We keep in mind we're in the retail business of handling claims, one by one, and not in the wholesale business where blocks of claims are disposed of simply by reducing inventory." Can you explain what that means, to the jury?

A It just says that individual claimants, like you and me, have a particular claim. And we ought not be grouped in with a larger group of people who have similar claims. We have our own individual circumstances that need to be considered.

Q And continuing on with this, it then states, does it not, "The following are proven methods of managing pendings. Number one, make prompt contacts and investigations." Do you agree with that?

A 100 percent.

Q "Number 2, make prompt decisions to settle or deny."

A Exactly, and that's one of our obligations.

Q Make prompt settlements in proper cases."

[51] A Exactly.

Q "Make prompt denials of claims which should be denied."

A It prevents us from misleading people.

Q Are there some claims that are handled on a daily basis by people in claims offices that are, in fact, denied, Mr. Moskalski?

A That would be correct. Where there's no legal liability, a determination has been made to that effect, then that claim should be denied as promptly as possible.

Q "Conduct prompt and realistic negotiations. Develop the art of salesmanship and use it diligently in all phases of claim handling." Do you see that as a negative?

A There's nothing wrong with that. That's talking about relationship building.

Q Okay. "Use initiative, imagination, aggressiveness, and persistence."

A Exactly. Aggressiveness, as a matter of fact, I see that as a very positive word, there. It means that our expectation of our claims people is that they're out there helping the claimant or the insured manage their claim so that it is brought to a conclusion as quickly as possible.

[52] Q "It is contrary to company policy to reduce pendings by, one, making settlements which are not supported by adequate file information." Do you agree with that?

A Yes, I do.

Q "Number 2, making settlements which violate sound claim handling practices."

A A hundred percent there, as well.

Q "To handle claims on any other basis does not constitute good judgment."

A I would agree with everything that you've read.

Q Okay. With respect to the last paragraph, it says, "Each divisional claim superintendent, with the assistance of his or her home office consultant, should develop specific procedures to deal with conditions which adversely affect pendings in the local area."

As a company, divided into regions, Mr. Moskalski, do your people, are they given the latitude to do what's proper in implementing practices in their specific units in dealing with claims?

A We think that we give them all the basic training they need to exercise sound judgment. And yes, I would agree with that.

Q Now, as you talk about that, Mr. Moskalski, [53] as the chief executive officer of this region, are you telling the jury that State Farm, individuals handling claims, never make mistakes?

A No, that's not the case at all. We're human beings, and just as you make mistakes every day, they're not mistakes of the heart, they may be mistakes of the head. But that is going to happen. And my obligation is when I do make a mistake I need to do something that makes it right.

Q Is there a program at State Farm to discourage people from getting attorneys if they choose to do so?

A Not that I'm aware of. Never has been.

Q In evaluating cases, do you know if, with respect to the training that claim representatives are given, are claim representatives taught by the company in terms of its principles, to evaluate a claim differently if an attorney's involved, versus someone who doesn't have an attorney?

A In terms of a bodily injury case, we set a range of values of low to high, and assuming nothing else in that case changes in terms of the medical picture for the claimant, for example, that range would stay the same, whether an attorney's involved, or whether there is no attorney involved.

[54] Q Now, are there occasions, or does it happen, I should say, that an offer may be made to a person before they get a lawyer, the person gets an attorney, and the case is ultimately settled for more than what was offered to the person before they got counsel?

A That, to me, seems to be a natural progression of the negotiations process.

Q Are there activities that you're aware of, Mr. Moskalski -- and I'll lay some foundation, here, if you have some understanding -- are there activities that are engaged in by some plaintiff's attorneys that drive up the cost of the claim?

A Well, that would be the element that I said is the variable in that. If a claimant has a certain injury, and we've evaluated it, and then you go to an attorney and there's additional treatment and they're sent to doctors and they're running the circuit, and

additional expenses are built up, additional treatment is incurred, then obviously that would have a reflection on the overall value of the case.

Q Are there some circumstances -- and I don't want to paint this with a broader brush -- but are there some circumstances that you're aware of where there are lawyers who send a client for additional treatment which may not be necessary or appropriate, just in an effort [55] to try and build the value of a claim?

A Well, there's an incentive to do that, in that they operate off a contingency fee. They usually take a, they advertise it's free if you come in, and, "There's no charge unless we recover." They usually take a third if there's no lawsuit, usually 40 percent if there is.

So there's an incentive to send the party out to additional doctors, and there's a network of doctors that certain attorneys know about, and they send them to it and they build the case. That's what we call it.

* * *

[56] * * *

Q Okay. With respect to claims, Mr. Moskalski, have you, since you became the RVP in Mountain States, have you organized a program where you, within this office, monitor each case that goes to trial within this region?

A Yes, I have. It's really a reporting system, a post lawsuit reporting system.

Q And can you tell the jury how you go about monitoring the litigation that may be taking place from the various offices that are out in the states?

A As a lawsuit is --

[57] Q And we're talking trials, now, are we not?

A As a trial is resolved, then the superintendent involved in that puts together a basic report, and which we talk about the

insured, we talk about the demands and the offers within the case, we talk about the facts that took place. There's a brief summary of the trial that took place, the actual trial itself, offers and demands, the final result that came in, and then there's an area for just general comments about unusual circumstances which might have occurred.

That report then moves to a divisional claims superintendent, who has an opportunity to ask questions about it and get clarification, and may even supplement the report so it's more complete when it comes in.

That, then, goes to a division manager of Duane Farrington, who gets a chance to look at it and get any additional input he needs, and add anything he needs to report. It then comes to the vice president of operations, Mr. Nixon, and then it comes to me, and then it further continues on a route to the vice presidents of agency so that they are, additionally, aware of the lawsuit activity that takes place in the three states.

Because they have to work in those areas from a standpoint of sales. And then, at the conclusion of that, if I have questions, when I see it we follow up, [58] back down through the chain, get those things resolved, ensure that proper action is being taken for our policy holders. And if everything looks and appears to be in order, that document is then thrown away, because I have no further use for it.

Q Now, why, Mr. Moskalski, are you personally, and these other people that you've talked about, why are you personally interested in each case that ends up getting tried within your region?

A That's my ultimate responsibility. That's kind of the ultimate litmus test of how well we're taking care of our policy holders. And if I don't know what's going on there, I don't know how well our policy holders are being taken care of.

Q Now, there's been discussion in this case concerning the fact that State Farm does not keep track of excess verdicts and awards that may result from those situations.

In this process that you have implemented in this region, are you aware of cases that have gone other than as planned, and have resulted in an excess verdict?

A Very much so.

MR. CHRISTENSEN: Your Honor, I want to interpose an objection at this time. When I deposed this man, he testified he had no personal knowledge of [59] the individual cases. And the documents that he relied on had been created just a few days before by someone else. I don't think that he can lay the foundation for this. Maybe I could ask a couple of voir dire questions.

MR. BELNAP: I'd like to respond before he, the court rules on the voir dire request, Your Honor.

THE COURT: All right.

MR. BELNAP: His deposition, at his deposition he supplied to counsel a summary of each of the cases that have resulted in an excess verdict in the state of Utah and the state of Wyoming. Since he's been a regional vice president.

He indicated in his deposition that these summaries were used by him to refresh his memory of the cases, and he can testify, and I think that if Your Honor is concerned, or counsel is, about foundation, I'm happy to lay some foundation. But I don't think voir dire's appropriate. This was an area that was gone into in detail in his deposition.

THE COURT: Lay the foundation and I will deny the request for voir dire. I think that it'll protract it.

MR. CHRISTENSEN: I guess my objection is hearsay.

[60] THE COURT: If he asks a hearsay question then I'll respond to the objection at the time.

Q (BY MR. BELNAP) Mr. Moskalski, in this process of having reports made on each case that is tried within your region, do you become aware in that process if a case has resulted in a verdict for more than the insured's policy limits?

A I'm aware of those, as aware of all cases that go to trial.

Q And in that process, Mr. Moskalski, do you and your staff find out what happened, and why?

A Yes, that's all contained in that report that comes in. And in addition to that, if anybody in that chain, that quality chain, has a question about what happened, we get an opportunity to follow up on it.

Q And has this been your practice as a regional vice president since 1989?

A Yes, it has.

Q Now, at your request, did you ask your divisional claim superintendents here in Utah, Mr. Arnold and Mr. Kingman, to supply you with a summary memo that identified those cases by name, and gave a brief factual background, who the plaintiff's attorney was, the name of the case, what occurred, that kind of thing?

[61] A Yes, I did.

* * *

[85] * * *

Q (BY MR. BELNAP) Mr. Moskalski, when we took a break we were talking about the suit report process that you have followed in the region, and your awareness of cases, and specifically when we broke we were talking about excess cases that have occurred in the state of [86] Utah.

Are you aware, Mr. Moskalski, if there have been five excess cases that have occurred since you became the regional vice president in Mountain States in 1989?

A Yes, I am.

Q Now, with respect to those cases, Mr. Moskalski, can you just simply tell us whether or not State Farm stepped forward and resolved those cases by paying them?

A In all five cases we did.

Q Okay. Now, why would State Farm do that, Mr. Moskalski, when an insured, a person, a man or woman, or whoever the insured is, has bought a certain dollar limit, known as a policy limit, and when a case is tried, why would State Farm, as you've indicated, step up and resolve those cases?

A I think there are two reasons. Number one, we do owe a duty to those policy holders. When we evaluate a case, and we determine it's one that needs to be tried, we recognize that there's certain consequences that go with that. There's certain risk any time you go to trial. And that stepping forward and paying those judgments when we've guessed wrong is just an acceptance of those consequences and taking care of our policy [87] holders.

Q Now, with respect to those cases, Mr. Moskalski, when were those -- Were those payments made within a given time -- Let me see if I can rephrase it. In those five cases, were they resolved and paid before there was an appeal taken?

A My memory of the five is that there was discussion of appeal, I don't recall any that actually had an appeal, and they were payments and resolutions taken shortly after the verdict, or the entry of the judgment.

Q Was there, to your knowledge, Mr. Moskalski, did any of those insureds that had an excess result lose any of their personal assets?

A Not in that case, and I'm not aware of any case where an insured has ever lost any property due to a levy from an excess judgment.

Q Now, having stated, Mr. Moskalski, the handling of these cases that have happened since you've become the regional vice

president, if this company tracks statistics that we've talked about, can you tell the jury why there isn't a statistic, or some sort of report in this region, that lists, on a report, an excess case?

A Well, the excess cases are part of the normal [88] reporting of bodily injury cases that we do. In this region, they've just been insignificant, you know, over a period of several years, 29,000-plus claims, and five cases since 1989 that involved excess judgments.

If I deemed it to be a problem, I would have a reporting system. But that's such an infinitesimal number that -- And I get the opportunity to follow up on the individual ones, individual cases. I just don't see the need to track it.

Q Now, as the regional vice president, Mr. Moskalski, do you have the responsibility and the ability to meet claims issues that may have arisen out of any of these excess cases?

A That's my ultimate responsibility, that's what I'm charged with.

Q And with that responsibility, Mr. Moskalski, do you have the ability to set policies within the region with respect to the handling of excess cases?

A Yes, I do.

Q Can you tell the jury, with respect to the handling of excess cases, you've told them that they have been paid and satisfied in those five instances, sometimes before even a verdict, or a judgment was entered, I think was your testimony.

In the future, Mr. Moskalski, as you deal in [89] this region with insureds that are going to have a case of theirs go to trial, can you tell the jury what State Farm, in addition to that, is going to do?

A Well, as is reflected in those five cases that occurred since I became regional vice president, we did step forward, recognized the consequences, and we never had an insured lose any property as a result of our decision to try a case.

And as I looked at the Campbell case and I tried to figure out, you know, what could we have done different in the Campbell case that would have avoided --

MR. CHRISTENSEN: Your Honor, I'm going to object to this as non-responsive. Also may we approach the bench?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. BELNAP) Mr. Moskalski, I think the question was, from this point that you were answering, from this region, what is the policy of this region that you have set that you're going to do with insureds in the future on these cases that go to trial and at risk?

A You just want the policy, not the reasons?

Q I want the policy first, and then the [90] reasons.

A The policy is that, in light of our history, we will give the insured a letter, when we make the decision that a case is one to be tried, the policy holder, ahead of that trial, will be given a letter saying that as long as they continue to do their duty under the policy, and that is to cooperate and assist us in the trial of the case, and there's no collusion, and that we have, in fact, gotten a demand within the policy limits, then they will get a letter that says, "We accept the financial responsibility that may result from this decision."

And I guess you'd call it a peace of mind letter, that will give the policy holders, they never have to worry from that point, forward.

Q Now, Mr. Moskalski, why -- Let me rephrase that. You've talked to us about the fact that you get suit reports in this region. And I want to ask you, Mr. Moskalski, what does it take to get your attention to a case where you have a concern, as you read those suit reports?

A It takes a number of things can do it. It can be a report that comes across my desk that talks about a verdict, it can be a policy holder who writes me a letter, it could be a policy holder

who calls me on [91] the telephone, it could be a number of things that alert me to the possibility that somebody may have made a mistake in judgment and it needs to be rectified.

Q And in this case, Mr. Moskalski, does this case and this jury have your attention?

A There's no question about it. I would hope that, as I looked at that letter that we've made a decision to give our policy holders, and I looked at it in terms of, "What lessons could we have learned from the Curtis Campbell case?" that was the big lesson. And I hope that you'll see that I do listen, I have a system in place that allows me to listen, and that I react. And I make changes that need to be made.

Q Now, I want to ask you, Mr. Moskalski, with respect to the Campbell case, have you reviewed the file?

A Yes, I have.

Q In hindsight, realizing this jury knows from the facts, Mr. Moskalski, that you were not here in Utah in 1983 when that case was tried, you were not here when the result came in, but in hindsight, Mr. Moskalski, can you see a basis, as a claims person that's been in this business for a number of years, in hindsight, that maybe something could or should have been done differently? Do you understand that question?

[92] A Yes, I do. Looking back at it now and saying, "What would I have done differently?" Recognizing that, after having read the file, it appeared to me that we had this massive confusion between the van drivers, that it narrowed down to a case of expert witnesses, and what the jury believed in that case. And knowing now, most importantly, about the side deal that had been cut between Slusher and Ospital and their attorneys to cooperate, I would have settled the case somewhere before a verdict came in.

Q Now, there's been testimony from witnesses like, just for example, come to mind, Mr. Geddes yesterday said that he felt in his career that he had dealt with, that he'd paid claims, I don't know what he used, fairly, or appropriately.

In your position, Mr. Moskalski, are there occasions when you see that people at State Farm have made mistakes?

A I see it on a regular basis. When you have those kind of numbers, you know, you have a number of things that can occur. You have people who make mistakes in judgment, you have people who make innocent mistakes because they don't know better.

But the essential part is that we have a system in place that allows us to catch those things and [93] respond to them and correct whatever went wrong.

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[94] * * *

Q I want to move to another area. There's been [95] some discussion that this jury has received about Article 12 from the Claims Superintendent's Manual. Have you had an opportunity to review that?

A I believe I have. If you have a specific reference, I might like to look at it again.

* * *

[97] * * *

Q (BY MR. BELNAP) There's been some discussion about controlling the claim, or various witnesses have talked about controlling the claimant. Have you heard those words before?

A Yes, I have.

Q Can you tell the jury what, in your understanding, State Farm has intended in its training process with its claim representatives, the message that they have intended to convey in using those kinds of words?

A The organization, and I did, as a claim handler and as a superintendent, interpreted those words to mean that we had an obligation that I referred to earlier to become involved, to develop relationships with people, to let them know that we're

there to help, that we go out and we make sure the medical reports are requested on a prompt basis, and we handle all the activities that are essential to the handling of that claim in a most expeditious way, so it can reach a [98] settlement point as quickly as possible. That's what we viewed as controlling.

Q Now, if we were to use the opposite of control, lack of control, as a claims person, what would you deem that to be in terms of claim handling, or improper claim handling?

In other words, you've explained what control is. If the plaintiffs in this case criticized State Farm for using that word, what would lack of control be, Mr. Moskalski?

A Lack of control, to me, would be the ultimate -- The ultimate result of lack of control would be a claim representative would not be handling their claims properly.

Q So there wouldn't be contact, there wouldn't be follow-through and that kind of thing?

A They wouldn't do their reporting on a timely basis, they wouldn't be getting medical reports. The whole process of getting monies to people that need it would be delayed.

Q Now, another part of this Article 12 talks about first contact settlements. Have you heard that phrase before?

A Yes, I have.

Q Okay. On a previous page we talked about the [99] fact that here in the state of Utah, and in Colorado, as I understand it, we have no-fault insurance; is that correct?

A That's right.

Q Now, in terms of this law, does this have an impact on whether or not I could bring a claim for a bodily injury if I'd been in an accident?

A Yes, it does. It creates a monetary level that must be exceeded in terms of medical expenses before the claim can be brought.

Q Now, here in the state of Utah, is it correct that before a person can bring a bodily injury claim and sue for damages beyond their medical expenses and wage loss, which they get from the policy -- Is that right?

A That's right.

Q Before they can file a lawsuit, the person has to have in excess of $3,000 of medical expenses, or a permanent injury; isn't that true?

A That's the existing law in Utah.

Q Okay. This manual was put out for nationwide dissemination, but what is your understanding in terms of the use of manuals and materials at State Farm if they don't apply in a given situation or state under its law?

A Well, each state, and the RVPs that have the [100] responsibility for those states have to look at the law in those states and determine what makes sense.

And in a no-fault state, like Utah, first contact settlements really don't make that much sense. Because you're rarely going to have somebody that you meet for the first time who has that kind of medical expense who wants to settle.

So that you have non-no-fault states, in other words those that don't have a threshold like this, don't have an amount of money you need to exceed. In those states, people can make claims from dollar one, and it might be more appropriate. So what I'm saying is, there needs to be, based upon the law in each state, individual procedures that govern what you do.

Q Now, in this state, Mr. Moskalski, if you were to meet a person, or a claims person, or to have someone come in and they'd had some property damage, and they also said, "I've had a medical bill," is there a program in place where State Farm, at this time, will, in fact, pay the medical bill if they desire, but they don't take a release?

A That's true. It's -- Due to the fact that one carrier who pays no-fault can collect against another carrier for that no-fault payment, and that is a more expeditious way sometimes to handle that.

[101] Q Does State Farm also have occasions where you advance people that have been injured money?

A Yes, we do.

Q With this Article 12 and the discussions we've had about it, Mr. Moskalski, does that article have any relevance to the Campbell case as you've reviewed the file? Putting aside the fact it's obsolete and the other things we've talked about.

A I know of no relevance that that has. It's an obsoleted deal, and I'm really surprised we're even here talking about something, because it does not reflect, even if it had some applicability, what we do today.

Q Was there a first contact settlement in the Campbell case?

A No first contact settlement. As a matter of fact, the contrary is true. We made a decision that it needed to be tried.

* * *

[113] * * *

Q I want to move to another area, Mr. Moskalski, and that is records management.

[114] Did you receive, in the ordinary course of business, general executive memo 158 that I've put up on the screen?

A All general executive memos come to me.

Q Can you just tell the jury quickly what this program that's being outlined here is, without detail?

A This is basically the memo announcing the establishment of a record management program, and covering some of the reasons for it.

Q What do you understand the underpinning philosophy of State Farm's record management program to be in terms of how long you determine, as a company, you're going to keep a given record?

A Basically what this program says, is that we need to manage our cost in terms of the thousands and thousands of square feet that are used for storage, like a full garage, I guess,

and that in order to do that, we need to set up a system that allows us to keep records that we have a business purpose for, that we have a regulatory purpose for, or that there has been some sort of legal hold put on them, and we need to have a system in place that puts some structure to that whole thing.

Q Now, this goes on to provide that a steering committee will issue a procedures manual to be developed. Did that ultimately take place?

[115] A Yes, it d[illegible]

Q And that committee has issued some minutes of its various meetings that took place in the context of developing this program over a two-year period; isn't that right?

A That's correct.

Q And as a response to that, was each region asked to appoint a records coordinator for the region?

A That was one of the initial things that we did.

Q And under the program, is that records coordinator charged with the responsibility, if there is litigation that's pending, where there's been a document or group of documents asked for, is there a procedure under this program to put a hold order on any throwing away of documents?

A That's exactly what the system was intended to do, to preserve those things that needed to be preserved for legal purposes.

Q Now, the plaintiff in this case has referred the jury to a stack of certificates of destruction that we produced to them in this case. Have you seen one of those before?

A I think I've seen the certificates. I don't -- I haven't seen those that have been produced [116] in this case.

Q Okay. In terms of a certificate of destruction, Mr. Moskalski, is it a statement that the records coordinator has checked with the procedures, and the records involved that are being thrown out have been kept within the time period set by the company for the keeping of that kind of record?

A It's a verification that that process has taken place in an orderly manner, and that the records have been disposed of in such a way that there's no confidentiality breached, and that every directive connected with the destruction order has been followed.

Q Now, I want to just show you a portion of the records management manual that is, the manual came out in the summer of '95; is that correct?

A That would be my memory.

Q Okay. And does it indicate in here the purpose of this program, Mr. Moskalski? Let me refer to right here, "State Farm's records management program was developed to ensure the retention and protection of company records, and to expedite the destruction of records that are no longer needed for business or legal reasons."

A That's what a, a summary of what I said earlier.

[117] Q And the retention and protection is number 1, "To ensure the availability of information required in the management of company activities."

A That's the number one item. Those that we need.

Q Number 2, "Ensure compliance with statutory and regulatory requirements."

A Yes.

Q Do you have an understanding if, in the formation of this program, research was done to determine how long things needed to be kept to be in compliance with insurance and other regulations?

A The codes of the various states were researched, as well as the regulations issued out of the insurance department.

Q And number 3, that it "Supports tax reports. Number 4, provides documents for audit requirements. Number 5, ensures the availability of essential information for the resumption of operations following a major disaster."

A All of those items.

Q Let me put up another page from the manual. The goals are, "1, to secure a company-wide records management program in order to properly retain records; number 2, secure a system to identify records being [118] retained and allow more efficient access to those records."

Have you faced a situation, Mr. Moskalski, in the past, in this business, where, if you had more records that included obsolete materials and things out of date, that it causes a problem just to sift through those to get to what you need?

A No question about it. I've run into that several times.

Q Can it cause a problem, Mr. Moskalski, in terms of claims handling, if the current materials and procedures are not the ones in place, and that a bunch of old stuff's laying around?

A Well, that's the reason we had, and still do, the process in place of when you get a manual revision, you take that old one out, you put the new in, and you throw the old away, and that way you don't have these old things that keep showing up and becoming potentially effective in the system, or the claim being handled pursuant to an old procedure.

Q Number 3, "To secure procedures to immediately suspend destruction because of litigation." Is that a bona fide issue that does happen?

A When those have been subpoenaed, then we need to comply with those.

[119] Q "To educate employees on the importance of management."

Now, in the minutes of this group of meetings which we've supplied in this case, there's a reference to a RVP conference in the fall of 1993. Have you seen those minutes?

A Yes, I have.

Q And it references the fact that at a given time the company has a large number of cases that are pending against insureds. And that's not disputed, is it?

A No, it isn't.

Q And I think it goes on to paraphrase that we need, as a company, to be looking for any windows of opportunity to be able to throw away materials, or something to that effect.

A That's what those minutes reflected.

Q Now, in terms of your understanding, from everything that you've been told and have implemented in this region, Mr. Moskalski, is there a bona fide reason at State Farm to have a records management program, and to be looking for legal and statutory windows of when you do keep records and when you can get rid of them?

A No question about it. Once the opportunity is there, we've got thousands and thousands of square [120] feet being occupied with file cabinets and boxes of files, and if there's no legal business or regulatory need for them, it's like cleaning out your garage, you've got to get in there and get rid of some of that stuff.

* * *

Q There's been discussion about a meeting that took place here in Utah in April of 1990, where a Janet Cammack came over from the regional office. Do you know Janet Cammack?

A Yes, I do.

Q Did you ask her to come to Utah?

A Yes, I did.

Q Can you tell this jury why you asked her to come to Utah?

A For the very reason we talked about on some of these previous memos. At that time, I was the registered agent for service of process in the state of Colorado, and in the other two states, as well. And I began noticing a lot of these discovery requests coming through, and I went to Janet, because she was a lawyer, [121] and I said, "What system do we have in place to make sure that we're responding to these subpoenas accurately and promptly?"

And I found out that we didn't have a good system. And I said, "Janet, I want you to develop something that ensures that we are responding to these things as we legally should, and as we properly should, and put that in place in the region." And that was her task.

Q Did you ever instruct Janet Cammack to provide a plan by which State Farm would get rid of documents that had been requested in a pending case?

A My instructions are just as I described to you.

Q I'll represent to you that Samantha Bird talked about the fact that what was being referred to was old stuff that people had put in their drawers and was not current manuals and current materials.

As a company, does State Farm want their employees to be using current materials?

A No question about it. And we really, I could see where they -- That's the pack rat in all of us, where they want to keep this old stuff around. But it has no use, it's not the current procedure, it's not the current policy, and it shouldn't be there, because it [122] just has a danger of confusing things when you try to handle claims, for example, later.

Q If a company doesn't have a records management program, is there a risk that in a lawsuit someone can bring forth an old record that's been outdated or obsoleted, and try and hang the company to those standards that are no longer in use?

A Now, to me that's one of the techniques that network attorneys use, is they take an old document that's a decade old, and they bring it forward and they say, "Look, jury, look at this document. And I realize it's fifteen years old, and I want to convince you that that's what we do today." And that's not what we do today. That's why these procedures are updated, and we want people to throw away the old.

* * *

[123] * * *

Q There's been reference in this case to the BI Proficiency Program. And it's been claimed that this is a program that, from the plaintiffs' experts, that forces people to do improper practices. I want to just look at the objectives of this program, "Enhance communication between agency and claim partners."

Is that talking about the fact that you team up claim representatives with certain agents so there can be quicker and more prompt service?

A And better communications between them.

Q And do you go on to provide that, "This is to eliminate delays and increase satisfaction and quality of the product"?

A This whole program is geared toward efficiency.

Q Does it go on to provide that as a company, in providing service to policy holders and others, that you want to get a file opened and get somebody on that claim so that it can be serviced quickly and properly?

[124] A The expectation is that they'll make the contact the day that the file comes in.

Q And do you see any ulterior motive or improper aspect to this program as you understand it, and as it is used in this region, Mr. Moskalski?

A Much to the contrary. If I saw myself as a claimant, having just been involved in an accident on my way to work this morning, that morning, the greatest expectation and greatest fulfillment I guess I could get out of that was that someone who was going to be responsible for that contacted me before the end of the day, I think it's great. I think it's a fantastic program.

MR. BELNAP: Thank you.

CROSS EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Moskalski, did you attend the 1986 claims superintendent's conference?

A You mean the divisional claims superintendent's conference?

Q Yes.

A No, I didn't.

Q You're aware that that's the one conference we got video tapes of and a transcript of.

A I understand that you do. I haven't seen [125] them.

Q Those were available in State Farm for a number of years as training materials. Are you claiming you never saw them?

A That's what I just said, I never did see them, no, sir.

Q You've had someone here in this trial reporting to you every day what's going on, haven't you?

A I've had discussions with my trial counsel.

Q I'm talking about your vice president that's been sitting in this courtroom for the last few weeks.

A I haven't had any discussions outside of my, with my attorneys.

Q But you have talked to him.

A With my attorneys.

Q He doesn't call you on the phone?

A We've only talked with our attorneys.

Q I see him on the phone every day in this case. He's not talking to you.

A We also have a business to run back in Greeley, Colorado.

Q We had this jury see a very short video tape of Manuel Mendoza. You know him well, don't you?

A I don't know him well. I know who he is.

Q Introducing a presentation made in the '86 [126] divisional claims superintendent's conference about company witnesses. And that's what you are in this trial, isn't it? Is a company witness?

A I'm representing the company I work for.

Q And he said, "We want well-prepared company witnesses, because we don't want to have to pay money in bad faith cases." Has that been reported to you?

A I haven't seen that report. We want well-prepared witnesses who are familiar with the case so that I can tell the truth to the best of my knowledge.

Q He said they wanted them well prepared so they wouldn't have to pay money in these cases. Hasn't that been reported to you?

A That has not been reported to me.

Q In that conference -- and the jury's heard it -- the State Farm attorney talked about witness preparation of company witnesses for bad faith cases like this, and he mentioned, first of all, a company witness needs a half a day with the attorney just for an attitude adjustment. Have you ever heard that before?

A No, I've not.

Q And then a rule of thumb is to spend one day with the witness preparing him for each quarter inch that the file is thick. You've never heard that?

[127] A No. I've read a lot of these books, though, getting ready for this case.

Q Well, it is true, is it not, Mr. Moskalski, that you've gone through a serious attitude adjustment since your depo a few months ago, haven't you?

A I have read volumes and volumes of material connected with this case in trying to get ready for it and in trying to make an analysis of it on my own.

Q You were deposed not too long ago, on April 26th, 1996.

A That's correct.

Q I took your deposition. In that deposition you stated under oath that you found nothing wrong with what Mr. Noxon had done in handling the Campbell file, didn't you?

A I told you I was not aware of anything that I knew was wrong.

Q And you said that Noxon, neither Noxon, Brown, or Summers had ever been reprimanded for anything done in the Campbell file, didn't you?

A Yes, I did.

Q And you said you weren't aware of anything State Farm has done in any way to treat the Campbells inconsistently with State Farm's practices and policies, didn't you?

[128] A At that time, that was my response.

Q And you said you had no criticism of what Wendell Bennett did, didn't you?

A Without having reviewed the file, I was answering all those questions. You knew that I had reviewed those case studies, and that I had reviewed a memo on records management, and that was the extent of my review. And I told you that when we started the deposition.

Q And you testified that there was nothing wrong with State Farm's treatment of the Campbells; isn't that true?

A Based upon my knowledge at that time, that was my response.

Q And you also said you'd not heard anyone at State Farm ever suggest that the Campbell case had been mishandled, didn't you?

A You'll have to show me that. I don't recall that specific language.

Q Okay, let me look for it.

* * *

[129] * * *

Q (BY MR. CHRISTENSEN) You were asked the question, "Are you aware of anyone at State Farm who's expressed the belief that the Campbell case has been mishandled?"

Mr. Hanni interjected, "By who?"

And I said, "Anyone."

And then Mrs. Eggly, an attorney from California, said, "Plaintiff's attorneys? Defense attorneys?"

I said, "Oh, by who? By State Farm."

And Mrs. Eggly said, "Oh."

And then you said, "I have heard no one at State Farm express that opinion."

So you said that, didn't you?

[130] A That's what the deposition says, I must have said it.

Q This was just a few weeks ago?

A Before I read any of this file material.

Q But it was a few weeks ago.

A April 26th.

Q You also testified that in your thirty-plus years at State Farm, that you have never been aware of a claimant being paid less than full fair value for a claim, didn't you?

A As I recall that question, it was whether I knew of any individual claimants who had not been paid a full amount, and I told you I had not.

Q So that's still your testimony.

A I'm not aware --

Q In your thirty years, you don't know of any claimant at State Farm that has received less than full fair value?

A That would still be my testimony. I am not aware of any claimant who has not received full fair value.

Q And you also testified that you were never aware, in over thirty years, of State Farm ever putting its interests over those of the policy holder?

A You'll have -- I -- You'll have to help me [131] with that. I don't recall that particular question.

Q Let's look at page 57. I asked you, on line 14, "Do you recall ever being aware of a case where you became concerned that State Farm was not acting in the insured's best interest?"

And your answer was, "I'm not aware of any cases that would fit that definition."

A That's correct.

Q And in your entire career you've never settled a claim yourself, without paying the claimant everything he was entitled to get; isn't that your testimony?

A I guess I have some trouble with "entitled to get." If the question is, have I always tried to be fair to claimants and insureds, my answer is yes.

Q And you're not aware of anybody in your whole career you've ever paid less than you thought the claim was worth.

A Keeping in mind the fact that there is a range of values for bodily injury that has a low range and a high range, and my feelings are that both of those values are fair. And that anything negotiated within those values is fair.

Q All right, let me have you turn to page 60 of your deposition, if you would, please. Have you found [132] that?

A Yes, I have.

Q On line 12 of page 60, I asked you the question, "Have you ever personally settled a claim for less than you felt it was worth?"

And your answer was, "No, I don't believe I ever have."

A And I still stand by it.

Q Now, at that deposition that was taken, you were designated as a 30-B-6 witness to talk about excess verdicts and punitive damage verdicts; isn't that true?

A That is my understanding.

Q And you showed up at the deposition and didn't even bring the documents that related to the excess verdicts, didn't you?

A You didn't ask me to bring the documents. When you -- As soon as you requested those documents I got them and I gave them to you.

Q No, we waited until the lunch break and you went and got them several hours later; is that right?

A I think that was your suggesting that we pick it up over lunch, because I had to go to another office.

Q And you sat in the deposition and you looked sideways the whole time; isn't that true?

A At that time I was trying to help the court [133] reporter by looking at him so he could read my lips better. And if I offended you in any way, I apologize here today.

Q And I asked you if there was a reason why you were looking sideways, and you said your attorney had told you to do it.

A That is not true, that's a misrepresentation. I told you, and you know it, that I was trying to concentrate on your questions so that I could truthfully and accurately answer them.

Q Are you aware that several of the witnesses back at State Farm corporate headquarters did the same thing, sat in the deposition and looked sideways?

A I'm not aware of that, no.

Q Now, you have indicated that you handle everything on a regional level. That the home office doesn't need to get involved in claims. Is that your testimony?

A That's my responsibility.

* * *

[140] * * *

Q (BY MR. CHRISTENSEN) Mr. Moskalski, we covered just before the lunch break your deposition testimony on April 26th of this year, a few weeks ago, where you testified that you felt State Farm had done nothing wrong in handling the Campbell case.

When Mr. Belnap was asking you questions, I thought I heard a change, and let me explore it this way.

You're now prepared to concede that the position that State Farm took last October in the trial, that lasted, I think, between two and three weeks, was wrong, that State Farm should have settled the Campbell case before it ever went to trial in Logan. Is that what I understand you to say?

[141] A My opinion was that, in retrospect, looking back at what took place in the Campbell case, and with all of the history, the post trial history, and looking back at it, I would have made a decision to settle the case.

Q You're aware that State Farm put the Campbells, the court, to a lot of trouble, and the parties to a lot of expense to take the opposite position last year, aren't you?

* * *

[142] * * *

Q (BY MR. CHRISTENSEN) You understand that State Farm, last October, took the position that it was reasonable not to settle the Campbell case and take it to trial.

A Do you ask did I know it in terms of the pleadings?

Q Well, it's a case under your jurisdiction, right?

A That's what was litigated, that particular issue, yes.

Q And State Farm claimed it did nothing wrong last year.

A We were defending ourselves.

Q You now admit that that position was wrong.

A I said that personally, looking back at it, I would have settled, in hindsight. In all that has taken place since then, I would have settled that case.

Q Now, let me move to another area. I'm going to show you a document this jury's seen before, we've been calling it the Samantha Bird memo. At the time that this memo was written on April 6th, 1990, you were the regional vice president over in Colorado, right?

[143] A That's correct.

Q Janet Cammack worked for you?

A She -- If you put all of the employees in the region work for me, and you say she worked for me, in that sense she did.

Q She was right in your office, wasn't she?

A She was in the regional office with 800 other people.

Q And she was an attorney right in that office.

A She was a lawyer, along with other lawyers.

Q And she wasn't just one of 800 employees. She's somebody that you worked pretty closely with, wasn't she?

A I had worked with her on this records management, yes.

Q In fact, she was a good friend of yours.

A I would call her an acquaintance, yes.

Q She has dinner with you and your wife at your house?

A As other staff members do.

Q You and Janet Cammack had worked together in Texas before you both got sent to Utah; isn't that true?

A We didn't get sent to Utah. I came to Utah, and she applied for a transfer later.

Q Well, you worked with her in Texas.

[144] A Yes, she was in practice, and then came to work with us as a claim attorney in Texas.

Q And you were the deputy regional vice president in Texas from '85 to August, '89; is that right?

A Yes, sir, I was.

Q You'd had some bad faith cases in Texas while you were there, hadn't you?

A I don't recall any bad faith cases.

Q No bad faith verdicts, you recall?

A Not as I sit here today, no.

Q No punitive damage verdicts you remember out of Texas?

A That's been my testimony all along, I don't have any recollection.

Q You know now, since you said that in your depo, that we found a bunch of them in Texas, don't you?

A I don't know that. You're making that assumption.

Q Well, I'll get into those with you later.

A Okay.

Q Are you denying that, as of April 6th, 1990, that you'd had one or more bad faith cases in Texas where you'd had to produce old claims manuals and so forth?

[145] A What you see there is not what Janet Cammack and I talked about.

Q Well, and I want to cover that with you. And even though we've been through it before, I want to read part of it. It says, "Yesterday in the staff meeting we talked about the need to purge our desks of old memos, notes, and procedure guides. With the

increase of bad faith suits being filed against State Farm, it is important that you get rid of all your old stuff. Know that you have lurking around in your drawers and file cabinets.

"Please get rid of all old memos, claim school notes, old seminar or claim conference notes, and any old procedure guides you may have. They are trying to avoid having to come up with old records when the request for production of documents comes in and they request all training manuals, memos, procedure guides, et cetera, that are in the possession of your claims reps and management. Apparently they had a request like this in Texas and each person had to surrender all their old junk." That didn't happen in Texas while you were there?

A I don't have a recollection of it, no.

Q Then it goes on to say, "I guess corporate's not even going to keep old CPG guides, old claim [146] manuals, et cetera." That's a true statement. Corporate's gotten rid of all that stuff, haven't they?

A You'll have -- What do you mean, "old stuff"?

Q Any manuals that aren't current, they claim that they've destroyed, don't they?

A I think our position has been that we had a system in place that allowed claims people and anybody who had manuals to get revisions to it, they were to delete and destroy that and replace it with the current material.

Q I'm talking about corporate. Corporate headquarters. Wouldn't it make sense for there to be at least one copy of every version of the manual somewhere in this huge company?

A If you assume that there's an obligation on the part of a company to keep documents around that network attorneys can subpoena and use and portray to juries as being the current procedures of the company, that just doesn't make sense, because then we'd never throw anything away, because there could always be some likelihood that some lawyer, somewhere, would want to sue us and look at an old document.

Q So you do admit you were getting rid of evidence.

[147] A No, that -- I didn't admit that at all, and I don't know that what is referred to up there is evidence. That is, it appears to me to be Samantha Bird talking to the people in her unit. That's not Janet Cammack talking.

Q All right, let's go back. "We will only have what is currently in effect. That way if they subpoena our claim manual for U claims for '87, for example, we'll say we don't have it. This should be easier than trying to produce it or having to defend it."

Now, Samantha Bird has testified here under oath that Janet Cammack came and gave those very instructions, just the day before. In fact, we produced some handwritten notes of Samantha Bird and some meeting minutes taken by an Elaine Rigler of this same meeting.

Now, isn't it true that you sent Janet Cammack to Utah to keep this jury from seeing the things described in that memo?

A That's a blatant misrepresentation of what I've told this jury earlier. I told them exactly what I had asked Janet to do, and that was to establish a system that would allow us to respond to subpoenas accurately and completely.

Q Now, there's testimony in this case that Felix Jensen was contacted by someone from State Farm [148] headquarters and told it was State Farm's official position that this document didn't exist. Is that your position?

A I don't know if the document exists or not. You're asking me to testify to something I really have no knowledge.

Q You're not willing to admit this is an authentic document?

A I don't know that it is or that it isn't. I really can't testify either way.

* * *

[150] * * *

Q In your deposition you denied you had [151] anything to do with this. That's still your position, I take it?

A I didn't deny that I had anything to do with it. You've mischaracterized my testimony again. My testimony was that I did have a discussion with Janet Cammack, I told her to set up a system to be sure that we could truthfully respond to these subpoenas that we were getting.

Q You already had a request for production of documents in the Campbell case as of this date, asking for some of these very materials, didn't you?

A I can't confirm that one way or another.

Q Well, the jury's seen it up on the screen before. Do you know that it's a second-degree felony in Utah to, if someone believes that an investigation or proceeding is pending, or is about to be instituted, to alter, destroy, conceal, or remove anything with the purpose to impair its availability for the official proceeding? Are you aware that it's a second-degree felony to do that?

MR. BELNAP: Your Honor, I'm going to object to that as irrelevant under the criminal code. That deals with another subject.

THE COURT: Sustained.

MR. BELNAP: I'd move to strike.

[152] Q (BY MR. CHRISTENSEN) Well, you're an attorney, aren't you, Mr. Moskalski?

A I've never practiced. I have a law degree.

Q You don't even have to be an attorney to know that destroying evidence, once it's been requested, is improper, do you?

A I have never given an instruction to destroy evidence.

Q Samantha Bird testified, produced her documents and testified in February of 1994. Yet you claimed in your deposition that you didn't even hear that she was saying this until late winter or spring of '95. Is that still your testimony?

A That's correct.

Q Five years after the meeting, and you didn't even hear about this.

A That's my testimony, and that's the truth.

Q It's a year after Samantha Bird testified and these documents came out. I thought you followed these cases closely, Mr. Moskalski.

A That has never been my testimony. I have described systems that are in place that allow me to have access to these if I need to do followup, and you must understand that there's no way that I could follow up on every detail that takes place in a region the size [153] of Mountain States. That's virtually impossible.

Q You consider this a minor detail?

A I see that as a document that's written by somebody that it is their perception of what they heard at a meeting. And I can't pass on whether it's important or not.

Q State Farm's lawyers had this document, at least, by Samantha Bird's depo in February of '94. Any reason to dispute that?

A I have no reason to testify one way or the other on that.

Q Yet you claimed, when I took your deposition a few weeks ago, that you'd never seen it; isn't that true?

A I don't recall exactly what my words were. That was the tenor of it.

Q You said you'd never seen that, or the minutes to the meeting, either, didn't you?

A If I may look at my testimony, I can tell you.

Q Okay. Let me refer you to page 150 to 151. Do you see there, beginning on line 20, I said, "I've marked as Exhibit 9 a typewritten document dated 4-6-90. It says, 'Subject, purging old files'"?

A I'm sorry, what page are you on?

[154] Q 150.

A And line 20?

Q Line 20. Let me read that again. I asked you the question, "I've marked as Exhibit 9." Does your deposition have exhibits attached to it?

A Yes, it does.

Q Do you want to look at Exhibit 9?

A Okay.

Q Same document, isn't it?

A Yes, it is.

Q Your testimony was you'd never seen it before I handed it to you, wasn't it?

A That's right, I said I have not.

Q I said, "Until this moment were you aware that it even existed?" I went on to page 151.

A And I, just as I've testified, I said, "This is the first time I've seen it, or have been told that it existed."

Q So your testimony is that even though State Farm was being accused of improper and illegal conduct by Samantha Bird in 1994, nobody even told you about it.

A My testimony stands on its own. I didn't know about this, that's true.

Q You never talked to Janet Cammack about it?

A No, I did not.

[155] Q It is true the Campbell case was the only bad faith that you know of that was pending in Utah when this meeting took place, isn't it?

A There was a '91 case. Well, this is a '90 meeting. I would have to agree with that, then.

Q You never investigated to see if she'd done this?

A It had not been brought to my attention, and I had no way of investigating something that I knew nothing about.

Q She's never been reprimanded for this?

A Not that I'm aware of, no.

Q In fact, she's been promoted since then, hasn't she?

A She has become a superintendent, and then a divisional claims superintendent.

Q State Farm never questioned anybody at the meeting, other than Samantha Bird, about this? That you're aware of?

A I have not. I can't testify as to whether or not anybody else has.

Q Were you part of the decision to take the position that this document didn't exist?

A I'm sorry, can you repeat the question?

Q Yes. There's evidence in this case that [156] Felix Jensen was told that State Farm's official position is that this document didn't exist. Were you part of that discussion?

A I know of no discussion that took place like that. You're making that assertion, but I know nothing about it.

Q All right. Before I move on, let me ask one other question. You said this morning sometimes you make mistakes, and when you do, you have to own up to them and make them right.

Let me give you that opportunity. Are you now willing to admit that, not only is this an official document from State Farm, but that you instigated this?

A I'm not willing to admit that, because I didn't do it. And if I admitted it, I wouldn't be telling the truth.

Q Now, you were designated at your deposition as a 30-B-6 witness to speak about awareness of punitive damage awards; isn't that true?

A Yes, it is.

Q That means you're not just speaking for yourself, but for State Farm when you're a 30-B-6 witness. Do you understand that?

A To the extent that I have knowledge.

Q Don't you have an obligation, if you're a [157] 30-B-6 witness, to take reasonable steps to determine what knowledge the organization has? Do you know that?

A When I came in to give this testimony I was not aware that I was to conduct a massive search around the country to find records of some sort.

Q But you were put forth by State Farm to talk about awareness of punitive damage awards, right?

A The systems, whether or not there is a system in place to track them was my understanding.

Q Then you proceeded to say that you didn't know of any punitive damage awards against State Farm, didn't you?

A I didn't, and I also testified about the systems that we had, which were really none, that we don't track them. They're part of the BI suit reporting system.

Q That's still your testimony, you don't know of any punitive damage awards against State Farm?

A None that I can specifically point out and say, "Here's a punitive damage award."

Q And you also said you knew of no bad faith verdicts against State Farm, didn't you?

A You'll have to show me my language, because "bad faith" is a particular term.

Q All right, turn to page 73, if you would. [158] I'm going to read, beginning on line 6.

Question. "What bad faith verdicts are you aware of against State Farm throughout the country?"

Answer. "I don't have any personal knowledge of bad faith cases from around the country."

Is that still your testimony?

A Yes, it is.

* * *

[159] * * *

Q Now, you were both over State Farm Fire and Auto in Texas, weren't you?

A I had some responsibilities in both arenas in Texas.

Q And in Texas, because of some quirks in Texas law, State Farm does some of its business under State Farm Lloyds, as well?

A That's correct.

Q And you had some responsibility for State Farm Lloyds, as well?

A I don't recall specifically performing any. Had there been a need, I would have.

Q What is State Farm Lloyds in Texas?

A It was a company created to write certain [160] lines of business down there, due to, as I recall, some peculiarities in the insurance law in Texas.

Q They write auto and homeowners?

A I don't recall that they wrote auto. I think it was just homeowners.

Q Too many black binders.

A I would agree with that.

Q I assume you've been made aware by now that, since your deposition was taken, we learned through Mr. Prater from some research done in another case, I think that was Smith versus State Farm in West Virginia, that in a time frame from '87 to '95 a database that was researched showed fourteen cases from the state of Texas where there had been findings of misconduct against State Farm. Things like --

* * *

[161] * * *

Q (BY MR. CHRISTENSEN) All right, I want to ask you about some bad faith punitive damage cases out of the state of Texas. And I'm going to look first at the Simmons case. The caption I'm looking at is a published opinion, it's 857 Southwest 2d, 126. It's a case out of the Texas appellate court.

MR. BELNAP: Counsel, which number is that on the list?

MR. CHRISTENSEN: I don't know.

MR. BELNAP: Can you give me that cite again?

MR. CHRISTENSEN: Yeah, 857 Southwest 2d, 126.

THE COURT: Can you identify the town in Texas that it arises in, some way looking at the facts?

MR. CHRISTENSEN: The Court of Appeals is in Beaumont, Texas. It looks like it was tried in the District Court of Montgomery County, Texas.

Q (BY MR. CHRISTENSEN) This was a case, Mr. Moskalski, where State Farm was found guilty of bad faith, there was a substantial punitive damage award, and the Court of Appeals in its decision refers to the fact, among other things, that there was an outcome-oriented pre-determined investigation in this case. Does this ring any bells to you?

[162] A No, it does not.

MR. BELNAP: Your Honor, can the record reflect that we have an objection, a continuing objection to this, and have discussed that before, and also at the bench conference?

THE COURT: It may.

Q (BY MR. CHRISTENSEN) This arose from some people whose home burned on June 2nd, 1985. That's right when you were in Texas, wasn't it?

A I think I got to Texas that summer. I don't recall exactly which one.

Q The claims handling certainly would have taken place while you were in Texas. Would this have fallen under your jurisdiction?

A Well, if the case was decided in '85, the facts leading up to it would have been before that.

Q No, the case was decided, this appeal was decided in '93. But the investigation in State Farm's conduct that was at issue would have begun in 1985. That was right when you were in Texas, wasn't it?

A I arrived in Texas in the summer of 1985.

MR. BELNAP: Just for my note taking, is the defendant in that case State Farm Fire?

MR. CHRISTENSEN: State Farm Fire and Casualty Company.

[163] MR. BELNAP: Thank you.

Q (BY MR. CHRISTENSEN) A violation of the Texas Deceptive Trade Practices Act. These people were accused of burning their own home.

MR. BELNAP: Your Honor, can I have a continuing objection to this, based upon who the company was that's a party to this case that's cited?

THE COURT: You may.

Q (BY MR. CHRISTENSEN) It was pointed out in the opinion that State Farm seemed to gear their investigation simply as supporting a denial of the claim, instead of investigating and talking to a number of key witnesses. You don't remember anything about this?

A No, I don't.

Q Let me ask you about another one. I'm now looking at the case of Nicolau versus State Farm Lloyds, an appellate court decision, 869 Southwest 2d, 543. It's the Texas Court of Appeals in Corpus Christy. And it was decided in 1993, it's out of the district court, and maybe you can help me say this, Nueces County.

A I would assume Nueces.

Q That's not familiar to you?

A No, it isn't.

Q Also a jury finding sustained on appeal of [164] punitive damages against State Farm of bad faith.

MR. BELNAP: Your Honor, I would object, again, based upon who the defendant is in this reported case that counsel's referring to, as being a non-auto case.

THE COURT: Overruled.

Q (BY MR. CHRISTENSEN) Part of what the Court of Appeals referred to in this decision was that State Farm had used an expert that was predictable, that they knew would find they didn't owe the money, before they ever sent him out there. This doesn't ring any bells to you?

A No, it doesn't.

Q How about the case of State Farm Fire and Casualty versus Price, decided by the Court of Appeals in Amarillo, Texas, 1992, 845 Southwest 2d, 427. It's a 1992 case out of -- I'm sorry, I don't see the county right off. I'm sure it's somewhere in the opinion. I've given the cite.

That case sustained some jury findings of misconduct on the part of State Farm. State Farm had agreed to cover the Prices' loss due to such damage, but then hadn't done so. Does that ring any bells to you?

A No, it doesn't. My testimony has been all along, I'm not aware of any of those cases, and your [165] reading them doesn't refresh my memory.

Q Let me try one other. This is State Farm Fire and Casualty versus Gross out of the Court of Appeals of Texas in Austin, 818 Southwest Reporter 2d, 908, a 1991 case. That case involved, among other things, the Court of Appeals refers to it, misrepresentations by State Farm and concealment with self-serving memos. Or at least a self-serving memo. That doesn't ring any bells, either?

A No, it doesn't. It sounds like all the cases are '93 decisions. Unless I read those reported cases, I'd be here in Mountain States.

Q But, for example, the last one I just referred you to, the initial problem with these people's home started in 1983. The conduct of State Farm in handling this would have been during the time you were there, would it not?

A I didn't go there until 1985.

Q But we had a trial, and then an appeal. So the trial would have certainly, the cases would have been in progress while you were there; isn't that true?

A I don't know. I can testify again that I have no knowledge of that case.

Q You have no knowledge of any of the other cases where State Farm was found guilty of bad faith or [166] punitive damages in Texas?

A I've already testified that way, and that's the truth.

Q You don't question there are a bunch of them, do you?

A You've read the cases. I have to assume that that's valid legal research.

Q I thought you testified earlier how concerned you are about these cases, and how closely you follow bad faith cases.

A I think you and I both know that I can't follow cases from around the fifty states. I try to keep up with what's going on in the region I have responsibility for.

Q But these were pending in Texas when you were there.

A I don't know if they were or not. I have no recollection of them.

Q You don't ever talk with people back in your old region in Texas to find out what's gone on?

A Oh, I probably have had a couple of conversations of a social nature, but I don't recall any conversations that I've had with someone that says, "Tell me what's going on in this area," and gotten an update on cases like that. That just would not happen.

[167] Q What about class actions? Do you know about any class actions against State Farm?

MR. BELNAP: Where?

Q (BY MR. CHRISTENSEN) Anywhere.

A I recall only one, one case several years ago, it was an employment situation.

Q Was it a female employee suing State Farm?

A Yes, it was.

Q You don't know of any arising from claims handling?

A Not as I sit here today, no.

Q Isn't it true there are a number of them, and have been in recent years, a number dealing with State Farm's practices in using salvage parts and what State Farm calls equivalent parts?

A I do, now that you've brought it to my attention, do recall that there was a case like that, that fit that description, but I can't give you any details on it.

Q In fact, these warranties that you've talked about State Farm now gives on after market parts, State Farm didn't used to do that, did they?

A When we first started into the program, we didn't have a warranty program that went with that.

Q After some class action lawsuits, you started [168] doing it.

A I don't know what precipitated that action. I do know that at some point in time we started giving a warranty, and then it has been modified once or twice.

Q I have copies of different pleadings from class action lawsuits from a number of states treating a whole variety of claims issues. You don't know about any of those.

A I'm not sure what you have in your notebook.

Q Tell me the ones you do know about.

A I don't know about any. I've already testified that way.

Q Now, you claim that there's no reporting or record kept of excess verdicts, punitive damage verdicts, or bad faith verdicts on to the home office; isn't that true?

A I've not only claimed, that's the way it is. That's the truth.

Q You don't tell the home office about excess verdicts, punitive damage verdicts, or bad faith verdicts?

A Do you mean -- Do you mean I have a reporting system, where I report to the president's office, or the board of directors? I do not.

Q You don't report it on to home office at all, [169] do you?

A No, I do not.

Q And you're aware State Farm claims that at the home office they don't keep a record of punitive damage awards, or excess verdicts, or bad faith verdicts.

A I'm aware that they do not.

Q It doesn't make any sense, does it, Mr. Moskalski, for State Farm not to keep a record of punitive damage awards. They must. Let me explain why I say that.

You acknowledged in your deposition that you knew that punitive damage payments had to be reported to the IRS on a form 1099. Isn't that true?

A I understand that that's, we do a 1099 reporting on those.

* * *

[171] * * *

Q The truth is, the home office doesn't want a record of punitive damage judgments; isn't that true?

A I don't know what there is, what their motivation is. I just know we don't do it, we don't have a program for doing it.

Q You don't report punitive damage judgments to the home office.

A I have no system to report punitive damage judgments to home office, or verdicts.

Q And if this jury awards a punitive damage verdict against State Farm, you won't report that, will you?

A I have no system to report punitive damage awards. That's my responsibility.

[172] Q If it's big enough, you'll report it, won't you?

A I didn't say that I wouldn't talk to corporate about a punitive damage case. I said I had no reporting system. If someone asked me if I had something like that, I would respond to it.

Q Now, your deposition testimony is that you're aware of no changes made at State Farm due to a bad faith verdict; isn't that true?

A I think at the time when I answered that question -- And it all tends to blend together, especially when I get into documents, as to what I've seen in reviewing files now, and what I was aware of at the time, so you're going to have to help me.

Q Turn to page 80, please. Beginning on line 17, I asked you the question, "Are you aware of any changes in State Farm's practices, policies, or procedures that have been prompted by a bad faith verdict against State Farm?"

Your answer was, "No, I'm not."

Have I read that right?

A You're on page 79?

Q Eighty.

A Well, 79 we were dealing with the same issue, and you asked me that question, and I responded, and I [173] said, "Not other, that is we continually evolved in our claim handling and the level of our service. We've trained our people to be responsive to that evolution in the law, but I know of no change in procedure or practices."

Q That was, you were reading your answer when I asked you if State Farm had changed any practices or pol[illegible]ies as a result of punitive damage awards.

A Yes.

Q And your answer to that, in essence, was no, right?

A Other than those things that evolved as the law evolved, as the business world evolved. We evolved with it.

Q But then you said, "I know of no change in procedures or practices," right?

A Written procedures or practices, is the direction I intended. I couldn't point to a procedure and say, "This was a result of that." I just said we evolved how we handled things.

Q You didn't say written changes. You said, "I know of no changes in procedures or practices"; isn't that true?

A That's true.

Q Of course, you're also telling me you knew of [174] no punitive damage awards; isn't that true?

A That was the truth.

Q Now, back to the question I asked you on page 80, and you switched over to 79, I said, "Are you aware of any changes in State Farm's practices, policies or procedures that have been prompted by a bad faith verdict in against State Farm?"

And your answer was, "No, I'm not."

A "No, I'm not." I didn't amplify further.

Q Now, you have indicated that State Farm keeps no record of excess verdicts.

A That's correct.

Q You're familiar with CMRs?

A Claim master records?

Q Yes.

A Yes, I am.

Q Let me show you one in the Campbell case. It is a little hard to see, I'll get out the other copy. I tried to mark it with yellow and it just smeared it. See, on the CMR on the Campbell case done after the Logan trial it says, "Excess loss," and there's a check mark, there.

A If that's what it says, I'll respond to it. I just can't see it.

Q Well, let me show it to you, because I think [175] this is important. Can you read that one any better?

A Yes, uh-huh. There is an "X" there.

Q So State Farm does keep some sort of record on excess losses, don't they?

A Well, that's a misrepresentation. Because what that is, is an indicator that goes into the claim master record, the computer system that we're required to keep when a case is settled, or that a reserve is set above the financial responsibility limits that are set in the state. Like, for example, if it's 25-50, and a reserve is set above that, it's a regulatory item that we have to report.

Q But if you can keep track of that, you could keep track of excess verdicts like were rendered against the Campbells, couldn't you?

A You're asking me to conjecture. Excess verdicts are just not a problem, as I perceive them. I see no reason to keep track of records just so that you have something that you can subpoena.

Q There's certainly no record kept at State Farm, or any reporting of what kinds of things happen to people like the Campbells because of excess verdicts, is there?

A I'm sorry, I didn't follow the question.

Q State Farm has no report or record of the [176] effect excess verdicts have on people's lives that have them rendered against them, do they?

A If you mean that it goes in, I have a report that says, "This is a particular situation that exists with an insured's personal life," I have no system that reports on their personal lives, no.

Q And in your depo you said you didn't have any personal knowledge of it, either, did you?

A No, I don't.

Q State Farm doesn't want to know that, do they?

A I'm here today, and I've been listening to this trial, and I've been reading these file documents. I do have an interest, and I talked about some lessons that I learned from the Campbell case, and how I responded to them. So you bet you, I want to know.

Q You want to make a good impression on this jury, and that's your motivation for what you've said today, isn't it?

MR. BELNAP: Your Honor, that's argumentative.

THE WITNESS: Well, if I may respond to it. If you think that the decision that I talked about this morning, that letter that we're going to give policy holders when the decision is made to try a case, then [177] you don't appreciate the magnitude of what I committed this organization to in the three states in which we do business.

Q (BY MR. CHRISTENSEN) Okay, and I want to explore that with you. This peace of mind letter that you've said is now your policy?

A Yes.

Q Now, you've mentioned there are five excess verdicts in Utah since you've been divisional claim, or excuse me, since you've been regional vice president. We haven't gotten to see those files. You're aware of that, I assume?

A You've got a report on them, just as I did. I gave it to you at the time of my deposition.

Q But that's a report that Mr. Kingman wrote up a few days before your depo.

A Mr. Kingman and Mr. Arnold.

Q Is it your testimony that if we did get to see those five files, we'd see one of those peace of mind letters in each one of them?

A I didn't tell you that that peace of mind letter was in there.

Q It's not, is it?

A No, I told you that I could testify, and I still am, that none of those policy holders lost any [178] property or money as a result of an excess verdict. And I will stand behind that.

Q And none of them got any peace of mind letters, either, did they?

A We were not doing that letter at that particular time. There were a couple of those cases, some assurances given to the policy holder that there was nothing to worry about. But those were post verdict.

Q Is that in writing?

A I'm sorry?

Q Was that in writing? If we had those files, would we see those assurances in there?

A I didn't say it was in writing. I said they were given those assurances.

Q They're not in writing?

A I don't know. The assurances were given -- I haven't reviewed those files. I've reviewed the same report that you reviewed, and it talked about the fact that those assurances had been given to the policy holder.

Q Have you ever seen one of those peace of mind letters actually sent out to a policy holder before a trial?

A No, I've told you that that's a decision that [179] I have made while this has been ongoing.

Q That decision was apparently made since your depo was taken.

A Yes, it was.

Q Now, the jury's also seen this before, I don't know if you have. This is part of State Farm's answers to interrogatories, where we asked State Farm to disclose all of the cases in Utah since 1980 that resulted in an excess verdict. And after an objection, the answer was, "Defendant has inquired of claims management personnel, and they cannot recall any other excess verdicts during the 1980s other than the Curtis Campbell case."

That obviously was not a true statement, was it?

A I think later we went back, pursuant to orders from this court, and did an exhaustive search to uncover those five files.

Q Well, you don't have records.

A That's correct.

Q And you've testified in your deposition you don't have any personal knowledge or recollection of these cases; isn't that true?

A Yes, it is. I did not have any personal knowledge. I can't be expected to remember every piece [180] of paper that I read in the course of a day. I don't think it's reasonable.

Q So what we've got is Mr. Kingman and Mr. Arnold came up with some cases and said, "That's it," and we're just going to have to trust them on that; isn't that true?

A They didn't just come up with cases. Those two gentlemen made, particularly Mr. Arnold made a good faith effort, an exhaustive effort, to find every case that you wanted.

Q Well, we've taken his depo, I took it, he said he just asked around, because there are no records.

A That's how you have to go. That's how you have to find them. You have to go into the offices and ask.

Q And your testimony was, from the state of Colorado, that all you did to determine whether there had been excess verdicts in Colorado was to search your own memory; isn't that true?

A I don't recall that those were my exact words. I do recall that I was not aware of any efforts that I'd made to find excess judgments in Colorado.

Q You said, on page 110 of your deposition, "The only effort that was exerted on Colorado cases was me going into my own memory to see if I could resurrect [181] any files that involved excess verdicts. I could not."

And then your answer goes on to something else. That's all you did, isn't it?

A That's correct.

Q And is it your testimony that in the entire history of the state of Colorado, there's never been an excess verdict against a State Farm insured?

A You're asking me to verify something that I don't have the knowledge of.

Q Or the records.

A Or the records. We were talking, this issue deals with Utah. We did a search for you in Utah to the extent that we possibly could.

Q And we're just going to have to trust you that it's accurate.

A We don't have any records. You're going to have to accept that.

* * *

[182] * * *

Q It's your sworn testimony, isn't it, that State Farm never had an appearance allowance program.

A The testimony was we never had a program that we dealt with appearance allowances. My testimony has consistently been

that we have an alternate settlement opportunity, or program, not program, but opportunity where that is a settlement form that can be made. But there's no such thing as a program.

Q Now, State Farm promises every policy holder that they'll be treated like a good neighbor, don't they?

A I assume most of our policy holders have seen the advertisements and said, "Like a good neighbor, State Farm is there."

[183] Q And that's the promise State Farm makes, isn't it?

A It's probably a series of promises. It means that we're going to handle claims, and we're going to handle their policies, and we're going to do everything to the best of our ability.

Q State Farm promises every policy holder they'll be treated like a good neighbor if they have a claim, don't they?

A I don't know we'd use those words. It's implied in our advertising and how we conduct ourselves.

* * *

Q Basically State Farm's in the business of selling peace of mind, aren't they?

A People have characterized the insurance [184] mechanism itself, in textbooks, as peace of mind. It's a way to protect financial assets from loss.

* * *

Q Now, State Farm has 14 million claims a year?

A It's my understanding country wide, it's a little over 14 million.

Q If it was possible to reduce the average pay per claim by $100, we'd be talking $1.4 billion, wouldn't we? Is my math right?

A I assume it is.

Q That's a lot of money, isn't it?

A Yes, it is.

Q That's a real temptation for an insurance company, isn't it?

[185] A I don't know that it's a temptation. Controlling and managing costs seems to be a very legitimate objective for an organization such as State Farm.

Q Including reducing average pay per claim.

A We've never reduced average pay per claim, other than some of those blips that I talked about, where you have a blip one way or the other. It's been continually, in all coverages, uphill.

Q Now, Mr. Belnap showed you yesterday a 1994 memo from Mr. Haines and Mr. Coffey of the home office.

A I recall it.

Q I think it was Exhibit 128. With this kind of a huge financial incentive to keep in mind, let me read this. "It is inappropriate for either the claim representative or claim management to include reduction of claim indemnity costs, pendings, or expenses as a goal, measure of job performance, or as a specific condition for a promotion or merit pay increase."

Is that another way of saying average pay per claim? That is reduction of claim indemnity costs?

A Yes, it is.

Q So we've got average pay, claim indemnity costs. What are some of the other terms that are used for this concept? Severity ratio, is that one?

[186] A Severity would be another term.

Q The claim ratio?

A Well, that's a much broader concept.

Q Now, let me explore this with you. Why is it inappropriate to have a claims representative or claim management to have a goal to reduce average pay per claim?

A As this PPR process evolved with claim people, we recognized that those type of goals which have been termed outcome-based goals could be misconstrued. In fact, there were PP&Rs in which it was misconstrued. Our intent was, I testified earlier, was to make that an awareness goal, and identify activities underneath the goal that would be engaged in, that would have that result.

Over time, as we evolved, we recognized that it was being misconstrued. We corrected it with the PP&R program that was introduced just in front of this, and this memo made it clear that that was applicable to claim management team, as well.

Q So this is bad because it provides some sort of incentive or motivation to claims people to pay less than they owe.

A No, it's -- The determination has been made to eliminate from the PP&R process because they could be [187] misconstrued, and that individual claims people really have no effect on the ultimate outcome of those costs. Their obligation is to handle each claim on its own merits, without regard to those costs.

Q Having the kinds of goals this says is inappropriate is bad practice, isn't it?

A We felt it was inappropriate. As we evolved we said, "What we have done earlier needs to change. We made a mistake with it, people are misinterpreting it, this is our new program." It makes sense to me.

Q That always has been bad practice, hasn't it?

A No.

Q You're prepared to admit that what State Farm has done for a couple of decades was wrong, aren't you?

A I'm not prepared to admit that. I am prepared to tell you that, as those goals were utilized in some instances, it turned out that that was all that was there, they didn't take the extra step and identify the activities that led to the goal.

Q State Farm's written a book on inappropriate goals, haven't they?

A I assume you have one of the PP&R introductory programs in your hand.

Q I have the booklet that introduced the PP&R program.

[188] A The original book?

Q Yes.

A That was a book that did introduce it. We thought we were doing the right thing then. As we evolved and we saw problems develop, we changed, as any good business would change.

Q That's because this is full of bad practices, isn't it?

A No, we changed because it didn't accomplish what we wanted to do, and it wasn't doing those things. People were misconstruing what we wanted. I wouldn't want to do anything else.

Q A lot of people were treated unfairly on claims because of those kinds of goals, weren't they?

A That is untrue. As I told you before, the objective was to make those goals awareness goals. Our expectation of handlers has been, and always will be, that they have to look at each individual case on its own merits. And we've made it abundantly clear, now, that they should not even have this awareness goal.

Q How about "hold BI paid cost"? Can we add that to our list of something that means average pay per claim?

A I'm sorry, where are you, now?

Q Holding BI paid cost. That's another way of [189] saying average pay per claim, isn't it?

A Yes, it is. But see that's the beauty of that goal, that's awareness. There it is underlined, and you can go right down under it. This is done perfectly. You can identify those things that you need to be doing.

Q Are you saying this is an appropriate goal, when the year starts, to decide you're going to find prior damage on a certain percentage of every car that you inspect?

A Can you help me read that? It says "list --"

Q It says, "List prior damage on X percent of all estimates written by a certain date."

A Okay, and what was your question, again? I'm sorry.

Q That's clearly an inappropriate, goal, wasn't it?

A Why? I see no reason, I don't want to be argumentative. But it says, "This is a highlight item, we want to make people aware of prior damage."

Q But shouldn't a person going out to inspect somebody's car be out there to determine the damage, rather than going out there to meet a goal to find prior damage?

A It's a legitimate part of the claim handling [190] process. As an insurance consumer, I don't want, and I don't think anybody in this room wants, an insurance company that I pay the premiums to, to be paying for damage that was caused by something else. That just doesn't make sense.

Q This is an incentive to find damage where it doesn't exist, isn't it?

A No, it is not. You've mischaracterized it.

Q Isn't that why goals like this are inappropriate?

A No. As I told you, that was the result of an evolution in the goal-setting process and management by objectives process, and we recognized that it was being misused. And we made it clear that they shouldn't be in there.

Q Well, I'm not sure I hear what you're saying. Let me put these back up. Are these appropriate or inappropriate goals, the ones I've underlined?

A Well, you've showed me a claims superintendent/ supervisor, and you asked me the question in my deposition, and I told you that I personally did not have any problem with an awareness goal that dealt with those areas, as long as they identified other activities that would lead to that result.

I also acknowledged the fact that there has [191] been a subsequent memo that says, "These are inappropriate," and I'm willing to abide by that. I do.

Q Are these wrong?

A Under the new guideline, that appears to be, I don't have a name, but it appears to be a claims superintendent, or supervisor, and that is a goal that we made clear in the memo from Mr. Coffey, should not be on there. And I don't know what the date is on that form, but I suspect it's before 1994.

Q This is out of the '79 PP&R booklet. Before we move on, I want to make sure we are tracking on this. Are you willing to admit these were wrong?

A I am willing to admit that that is no longer our procedure, and that we tell our claims management people they should not be utilizing these goals today.

Q They're wrong.

A Today.

Q They were wrong in 1979, weren't they?

A They were not.

Q Now, that sheet I just showed you is out of this '79 book we got from Mr. Crowe. State Farm claims they don't have this, don't they?

A I don't know.

Q Mr. Crowe had it, and produced it. What will State Farm do with this, in your region, now that we've [192] found it in Mr. Crowe's documents? Will you destroy it, or will you keep it?

A We shouldn't have it. It's been replaced with two other revisions.

Q So you'll destroy it.

A It should have been destroyed a long time ago. We don't have it, would be my assumption. When you get a new book, there's been two revisions of it, the most current one should be the revision we got in the early nineties.

Q Now, yesterday you testified that the PP&R program, if my notes are correct, was just for the development of individual employees. Do you remember saying that?

A That's one of the purposes of the PP&R.

Q And I'm looking at the '79 booklet. It says the purpose, "To translate and actuate corporate, regional, department, and function annual plans into individual action plans for all levels of employees."

The purpose of the PP&R was to have the corporate objectives translate right down to the individual in the company, wasn't it?

A That language was intended to make sure that, as individuals, whether they're superintendents or claims people, or underwriters, were not setting goals [193] and objectives that were contrary to the overall corporate and regional goals. That there needed to be a dovetailing, if you will, of those activities. So we wouldn't have a claim representative saying, "We want to do more paper work," at a time when we're trying to computerize the systems.

Q All right, now, you have acknowledged that reducing average pay per claim, or claim severity as an objective, is inappropriate.

A Under today's program, we have said that that should not be done.

Q Let me ask you about this. I'm now going to show you part of a speech Mr. Macherle gave at the '86 claims superintendent's conference. I'm on trial page 504. By the way, the name of the conference, I believe, was "The Bottom Line." Does that ring any bells to you?

A No, it doesn't. I was not there.

Q I'm going to read the underlined part. And this is Mr. Macherle speaking to all the divisional claims superintendents around the country. Wouldn't that be true?

A I assume if this was the meeting you're talking about, and I accept your stipulation.

Q This would be just under 200 divisional claims superintendents.

[194] A Again, if I accept your stipulation. I don't know.

Q All right. "Especially in relation to the bottom line that I want to talk about, and that is being better than the competition in everyday claim handling. Really what I'm talking about is the loss ratio. Because that's the difference between profit and loss."

Then he goes on to talk about the $10 billion surplus, and I think it's now a little over $25 billion.

A What he's talking about there is the fact that good claim handling procedures, good claim handling in general, is part of the process that we have the responsibility for, for our policy holders.

Q All right. And then I'm going to go to the underlining part on the next page, which is trial page 505. He says, "Now, you all know losses are a function of frequency and severity." Frequency is how often you get claims, right?

A That's number of claims per thousand or per 10,000, however you compute it.

Q And severity is the average pay per claim.

A Well, basically. It can be computed two ways. It can be computed as average paid, or as average reported, which is kind of a technical thing from the insurance standpoint.

[195] Q He goes on and says, "You can't do a whole lot about frequency, but severity is strictly in our ball park. That's the one we have to totally worry about."

He's telling every divisional claims superintendent in the country to totally worry about average pay per claim, isn't he?

A He's telling them to be concerned and be aware of our cost, and what things we can do to manage those costs, whether it's prevailing competitive price, whether it's using quality replacement parts, whatever, that there are legitimate and valid claims handling things that we need to be aware of.

Q He's telling them to worry about average pay per claim, isn't he?

A He's telling them to have an awareness of it.

Q Do you see the word "awareness" there?

A No, I don't see the word "awareness," but that's what I think the meaning was.

Q Now, you mentioned the BI Proficiency Program in your testimony.

A Yes, I did.

Q That's something State Farm is pushing heavily right now, isn't it?

A It's a fairly current program. My memory is [196] it's a couple of years old.

Q I've seen a lot of PP&Rs where people commit to go full bore on that. Right in the BI Proficiency Program materials, we see number 2, which is "Reduction of average paid costs by $578 per claim." That's a major purpose for the BI Proficiency Program, isn't it, to reduce average pay per claim?

A It's to be aware, and to manage our cost.

Q And you're still using that program, right?

A The BI Proficiency Program is being utilized, yes.

Q In fact, in spite of what we saw on the screen of the '84, or excuse me, '94 memo, saying goals to reduce pendings to reduce average pay per claim -- I think that said indemnity costs -- are inappropriate, you're still doing it, aren't you?

A I don't know where that document that you put up on the screen came from. I haven't seen it before.

Q It's out of the BI Proficiency booklet.

MR. BELNAP: 1990.

Q (BY MR. CHRISTENSEN) This is the current BI Proficiency Program, isn't it?

A It's another old document, I assume.

Q Are you saying this is outdated?

A I don't know. I haven't seen that document [197] that you put up.

Q You've never seen this booklet on the current program?

A I don't have a recollection of having seen that book, no. What I am familiar with is the general claims memo that you had up earlier.

Q My point is, in spite of what the memo says, there's still goals, incentives, encouragement, pressure put on claims people at State Farm to reduce average pay per claim; isn't that true?

A We have an objective as the organization to make people aware of the need to manage the cost in that area, and I think it's a legitimate business cost, just like you would manage cost in any kind of business.

Q Let me show you a page from your deposition taken last April, just a few weeks ago. I asked you the question, "Have you, in your time at State Farm -- and I don't intend to limit this to your current position -- but in your time at State Farm, have you ever been aware of PP&Rs setting goals to reduce average pay per claim?"

You said, "I have seen that on some PP&Rs, yes."

And I said, "Where have you seen it?"

And your answer was, "I have seen it on some management PP&Rs."

[198] I said, "Can you be more specific?"

You asked, "In terms of the name?"

I said, "Name, time frame."

You said, "Well, the time frame I've seen it, gosh, since maybe as far back as 1970 up, off and on, almost to the present."

Isn't it true, Mr. Moskalski, that there are still PP&Rs setting goals to reduce average pay per claim?

A If your question is, have I seen goals in the last year for claims people who deal with average, that deals with average paid cost, my answer is no.

Q In the last year.

A Yes, because I was coming -- That was a 1994 document that Mr. Coffey and Mr. Haines published, and I felt confident in my region that those goals were not appearing after that memo came out for claim management people.

Q You gave this answer on April 26th of this year.

A And I said, "Almost to the present." '94, to me, was almost to the present.

MR. CHRISTENSEN: This is trial page 1811.

MR. HUMPHERYS: Of Exhibit 51.

Q (BY MR. CHRISTENSEN) Exhibit 51, I believe. [199] This is a PP&R for a claim superintendent. Do you see the time frame, July, '95 to July, '96?

A Yes, I do.

Q Look at number 2. It says, "I will review, evaluate, and analyze all statistical data available pertaining to my unit. I will focus on factors that impact this data and be able to explain and be accountable for the changes in this data."

All State Farm has done is disguise the language; isn't that true?

A No, I don't think that's the case at all.

Q The data that's being talked about there is average pay per claim, among other things, isn't it?

A They're looking at a whole myriad of activities that are, a statistical report that reflects cost, not only claims cost, but the cost of doing business, budget. I think it's a legitimate thing to do to be aware of what your costs are. And to be able to explain them.

Q Let me show you another one. This is for Mr. Paul Short.

A What time frame is this, counsel?

Q The time frame is --

MR. BELNAP: Do you have a trial page on that, counsel?

[200] MR. CHRISTENSEN: Yes, it's 1493. Time frame I've got down is '95-'96.

MR. BELNAP: Can you give me a moment just to get there? Thank you.

Q (BY MR. CHRISTENSEN) Same thing, right here, isn't it?

A It's telling him to be aware of his costs of all kinds, and to analyze them.

Q We're looking at paragraph 1 under financial stability.

I've got three more of these, I don't know if they're worth putting up on the screen. I'll represent to you there's even more samples in here. But will you confirm that these other three have that identical language in it that I've marked in yellow?

A It appears to be the same language.

Q And these are all from the '94 to '96 time frame?

A I didn't see any time frames on them.

Q Well, I'll give the trial pages, 37 on one, 1096 on another, and 670 on another.

Are you familiar with a person by the name of Brad Partington?

A Yes, I am.

Q Who is Brad Partington?

[201] A He was a divisional claims superintendent who used to work in Utah.

Q Where is he now, do you know?

MR. BELNAP: What page are you on?

MR. CHRISTENSEN: I'm now on 1272.

MR. BELNAP: Thank you.

Q (BY MR. CHRISTENSEN) I'll represent to you this is Mr. Partington's PP&R. Do you see it's dated the end of '95?

A It appears to be '95. I can't be sure.

Q It's dated -- Oh, excuse me, let me go back, here. It's for the period from December, '95 to December, '96, right?

A That's what it appears to be from here, yes.

Q Do you see number 2 there at the top of page 1273?

A If you could read it for me, it would help. I can make out most of the words.

Q What I particularly want to point out to you is item A, "indemnity payout."

A I need to understand the other that you've --

Q Do you want me to read that?

A I can't see all of it. Thank you.

Q "Through my leadership role in the diagnostic phase, I will facilitate identification of strategies [202] for improvement in the quality of claims service and operations. Our success will be measured by achieving quantifiable positive trends in claims performance measures such as, A, indemnity payout."

That's average pay per claim, isn't it?

A Allocated adjustment expense and customer services, and employee morale.

Q It's still going on, isn't it?

A He's talking about a program to take a look at our operation, and find ways that we can deliver our products and services in a more quality fashion, called "Advancing Claims Excellence."

Q Now, just as goals to reduce pendings or reduce average pay per claim are inappropriate, a goal to try a certain number of cases would be wrong, too, wouldn't it?

A I can't agree that, as a general statement, that that goal would be wrong.

Q Well, shouldn't the decision whether to try a case, or settle it, be based on the merits of the case, and not on some pre-determined goal?

A That may be an awareness goal, where he's looked at his record and he's determined that in that particular area, their feeling is that more cases needed to be tried when you look at the ratios of trying to [203] settle, because we need to have the ultimate litmus test of what a jury will, in fact, do with cases like that. So we can measure and determine the value of other cases.

Q So you think it would be okay, for example, for Bill Brown to have tried the Campbell case to meet a goal, rather than deciding whether that was in Campbells' best interest?

A Those kind of decisions aren't made. Those are awareness goals, where you have to look and make a determination as to what overall is going in. But individual decisions on lawsuits have to be just that. They have to be individual decisions on what to try and what not to try.

Q Do you recognize this man?

A That's Bob Macherle.

Q This is from an "Obiter Dictum", isn't it?

MR. HUMPHERYS: A claims school course.

Q (BY MR. CHRISTENSEN) I think it's a claims school course. He says, "Let there be no doubt that our goal is to give the best, most efficient, and most profitable claim service in the industry." That is a totally inappropriate goal, to try to make a claims department profitable, isn't it?

A If you view it in terms of the fact that [204] they're being able to operate efficiently with legitimate cost-saving items, as we've discussed earlier, like salvage parts, or quality replacement parts, and recognizing that they contribute to the total equation of profit in a region, I don't see anything wrong with it.

But if you view it as you're trying to view it, as you're saying claims is a profit center, it's not true. Because claims doesn't have any income, they can't be a profit center.

Q What are the sources of income for an insurance company?

A Premium dollars.

Q That's only one, isn't it?

A Investment income. More particularly in number 1 is earned premium.

Q Now, we have in evidence some financial information relating to State Farm. State Farm's current surplus is a little over $25 billion, its current assets a little over $54 billion. Now, this surplus is, are funds that are extra, that aren't earmarked for specific claims, right?

A They're not extra funds. They're funds the policy holders need to be able to, for us to pay their claims. Those funds just don't sit there as extra [205] funds. They may not have the designation on them right now, but they're intended to take care of policy holders in the time of need.

Q I want to make a distinction, I don't think you and I are communicating. When a claim is made, let's say somebody reports in a claim. At some time in the claim process State Farm has to make a judgment as to about what that claim's going to cost, and set money aside for that. It's called a reserve, right?

A The reserve.

Q And what's the official title for that kind of a reserve?

A That's just a claim reserve. I don't know that it has a title beyond that.

Q This term, "surplus reserves," is money that's in addition to those that are set aside for specific claims, right?

A Right. The insurance mechanism is that there are certain claims that are already identified as outgo items. But there's also this huge area called contingencies. None of us know what accident we're going to have on the way home from this trial today. Those monies are set aside to take care of those accidents that are unknown.

Q But State Farm can take that $25 billion and [206] invest it, right? If that's the only prudent thing to do?

A That's what we're required to do, yes.

Q And if it had a 10 percent return -- I'm doing that to make my math easy -- State Farm would have $250 million.

MR. HUMPHERYS: $2.5 billion.

Q (BY MR. CHRISTENSEN) Excuse me, my math is bad. That would be $2.5 billion in investment income; isn't that right?

A If the counselor's math is right.

Q You probably shouldn't trust my math.

A Lawyers are never known for their math.

Q Well, we know how to divide by three. We know what a third is.

A I understand.

Q Very often insurance companies will actually do business at what's called an underwriting loss, because they can make up the difference with investment income; isn't that true?

A That has been a trend, with the market being what it is in recent years, that regulators have recognized that, as long as you have an operating profit, then that's one of the measurements that you use to set your rates by.

[207] Q Now, the funds that are available for State Farm to invest aren't limited to this $25 billion. You've got all the other claim reserves available to invest while the claims are being processed, right?

A Those monies are invested. Prudently.

Q Do you know how much State Farm has in investments?

A Counselor, you're into an area that I am not a CPA, I'm an administrator, and you're getting into an area that I have no knowledge about.

Q Somewhere between $54 billion and $25 billion would be the State Farm investments?

A I couldn't testify that one way or the other, I don't know.

Q And so income, or profit properly should come from these sources, right? Not from claims handling.

A In terms of -- Claims becomes part of the process, because the amount of claims, the severity, the frequency that you have, goes into the rates that you set that result in the premiums that are income. So there is a relationship, there.

Q But you shouldn't try to enhance company profits by underpaying claims.

A That's not what we do.

* * *

[208] * * *

(The jury left the courtroom.)

THE COURT: Let the record show the jury's left the courtroom. Do we have anything we need to put on the record this afternoon?

[209] MR. BELNAP: Just, if I could indicate at the bench conference I objected to the cases being referred to that were done, or gone into, excuse me, in cross examination. We've talked about that before generally.

Specifically, in regard to this witness, I don't think that we opened the door on cases from other jurisdictions. And further,

I don't believe that fire company cases, of which those all were, except the Lloyds case, which is like a fire company, or homeowner's case, are appropriate, Your Honor.

THE COURT: Mr. Christensen, do you or Mr. Humpherys want to respond?

MR. CHRISTENSEN: Yes, let me respond very briefly. The court's ruling before the trial was that these cases--and we did disclose these, whenever it was--could be used for impeachment and rebuttal. The specific language of the order indicated that they would not be subject to the same limitations as our case in chief.

Also, this particular witness was designated as a 30-B-6 witness to testify as to an awareness of punitive damage claims. He then, in his deposition, as he did here, said he didn't know of any. And so we felt that it was fair to use the cases.

I didn't use all fourteen, I used published [210] appellate decisions to challenge that. And furthermore, I think State Farm crossed the auto-fire line a long time ago in this case, including with this witness. And this witness was over both fire, auto, and said he was over Lloyds, too, in Texas.

THE COURT: I think Mr. Humpherys added another point, and that is that there was some testimony about his awareness of these kinds of cases, and this went to impeaching that particular testimony.

MR. HUMPHERYS: Yeah, let me set forth that quickly, for the record.

In the direct examination by Mr. Belnap, he was being asked that in his responsibilities and duties, whether he was given suit reports, which he said he did, he then said that these were very, he was very sensitive to these kinds of cases, very aware. He responded to them, he tried to react.

And then testimony was elicited to the effect that these kinds of cases are the kinds of cases that he takes action as a result,

and responds. And then he proceeded to say, such as in this case, the Campbell case, we have taken action now to, from this point forward, to send out "peace of mind letters."

And so it went to impeaching him on the fact that he has not and does not do this, and that this was [211] a self-serving testimony for this case.

THE COURT: Well, my holding was based on the arguments that counsel for the plaintiffs made.

I think I should make a note, as Mr. Christensen said, there has been a somewhat different standard applied in this case, and I think it's going to apply clearly on both sides, that when it comes to impeachment -- and I think the record's clear on impeachment efforts with Mr. Crowe, of Ms. DeLong, and of Mr. Slusher -- clearly State Farm has made reference to fire cases.

I remember going on record very specifically to advise Mr. Garrett, and having been about as pointed as I could, which is a role I normally don't play, it just seemed to me that he was perhaps unmindful of that issue. He probed without any discrimination to impeach Mr. Slusher on fire cases.

So it seems to me that, at least with respect to the areas of impeachment, that the line that the court drew between auto and fire has been eliminated. Though I do think that the line is an appropriate one when it comes to substantive evidence, and will continue to be mindful of the distinction in that respect.

MR. HUMPHERYS: Your Honor, could I clarify for the record? I think there may be some names mixed [212] up. I think it was Mr. Prater that was testifying, and it was Jim Chandler.

MR. CHRISTENSEN: Crandall.

THE COURT: Did I say --

MR. HUMPHERYS: You're absolutely right. It was Prater and Crandall.

THE COURT: Who was it I said, Garrett? I don't know where that came from. But you're right, it was Mr. Crandall, and the witness was Mr. Prater. I appreciate the correction.

* * *

[Vol. 22, R. 10277, commencing at p. 4]

* * *

ELTON "BUCK" MOSKALSKI the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Moskalski, within the region are premiums determined, or are those determined out of the home office, what premium rates are?

A We have the basic input on it. We have actuaries who do the calculations for us, and we get input from our agents and other staff members. And between the two of us, we work out a decision as to what the rates are going to be.

Q Is the division manager, does he have authority over setting premium rates?

A Division manager doesn't have the ultimate authority. I do there, but he or she participates in a [5] discussion.

Q Now, we were talking about in the 1994 memo from Mr. Haines saying it was inappropriate for either a claim representative or claim management to include the things listed here as part of goals and PP&Rs. Certainly it would be inappropriate, as we were discussing yesterday, for people involved in claims to have profit goals, wouldn't it?

A That's what that memo talks about.

Q But you said -- Mr. Fye, then, and Mr. Humpherys, discussed some PP&Rs of division managers that had profit goals. And you, when Mr. Belnap was questioning you, said, "Well, that's okay for a division manager to have a profit goal, because he's not involved in claim management."

A I think my answer was that it was entirely proper for a division manager to have those kind of goals, because he is responsible for the underwriting service, as well as the claims function.

Q But he is part of claim management, isn't he?

A Not in terms of that memo. He is a division manager, and as we discussed yesterday, he has no claim authority specifically.

Q In this case, we've had Samantha Bird testify that when Bob Noxon wouldn't give her the settlement [6] authority she needed to pay what was fair on claims, she went over Bob Noxon's head and went to John Martin, who was division manager, wasn't he?

A John Martin was a division manager at one time in Utah.

Q And Felix Jensen also went to John Martin, division manager.

A I can't say that he did. I can --

Q I'll represent to you that testimony has been presented in this case. They went to him because he had management authority over Bob Noxon, who was a divisional claim superintendent; isn't that true?

A He did have management authority over divisional claims superintendents.

Q But it's your position that he was not part of claim management?

A If I accept your premise that he was part of claim management, then I'd have to accept the premise that I'm part of claims management, and that's not the case.

Q That's absolutely true. You are part of claims management, aren't you?

A I am not. I have responsibility for the claims function, but I am not a claims management person, no, sir.

[7] Q Didn't you testify yesterday how you're over all the claims, and how concerned you were about the Campbell claim and that sort of thing?

A That doesn't change my testimony. I do have the ultimate responsibility for that, but I am not a member of claims management.

Q Well, that's a fairly self-serving definition of claim management, isn't it, as it pertains to this memo?

A I don't think it's a self-serving definition at all. It's self-explanatory. Within the State Farm organization claims management includes people who have a claim function, and that goes up through the divisional claim superintendent.

Q So before we move on, your testimony is that the division manager has nothing to do with managing the people that handle the claims?

A That mischaracterizes what I said. I said that the division manager does have the responsibility for the overall supervision. He is not a member of claims management.

Q But he does manage the people that handle claims?

A He has the ultimate responsibility for those people who work in the claims functions. Just as he [8] does in the underwriting function, and just as he does in the service function.

Q And the divisional claim superintendents, like Mr. Kingman -- And I wonder if we should mark Mr. Kingman as an exhibit in this case.

MR. BELNAP: Let's do it. No objection.

THE WITNESS: I'll even stipulate.

MR. CHRISTENSEN: Do you want to do that, Melba?

Q (BY MR. CHRISTENSEN) The divisional claims managers -- Have I got that term right? I keep getting these mixed up.

A We have divisional claims superintendents.

Q Divisional claims superintendents report directly to the divisional claims manager?

A To a division manager.

Q And the only way that the division manager can meet his goals is to have the people that report to him perform. Isn't that true?

A All the -- In order for us to accomplish those things that we need to do as a company for our policy holders, we have to work through our employees.

Q And as we've looked at the PP&Rs of division managers, there's all kinds of reference in those to claims management, isn't there?

[9] A If you mean, in terms of references to claims management, meaning that there's awareness of statistical costs, I would agree, yes, in division manager PP&Rs, there are those references.

Q I'm going to show you a page from the transcript of the divisional claim superintendent's conference in 1986, it's trial page 366.

MR. BELNAP: Can you give me a moment?

MR. CHRISTENSEN: Sure.

MR. BELNAP: Thank you.

Q (BY MR. CHRISTENSEN) I'm going to refer you to a statement up at the top of this page, we've referred to before, it says, "There's two inviolate rules to writing a document to a claim file. One is, it's on an eight-and-a-half-by-eleven sheet of paper. And secondly," and this is the one I want to talk to you about, "And secondly, all documents are prepared, 'Dear Mr. So-and-so and Ladies and gentlemen of the jury.'" This is talking about the two inviolate rules of writing documents to put in claim files, and this is specifically referring to bad faith cases.

It goes on to say, "If you follow these two rules you'll have no problem, but those are rules that need to be followed by your outside counsel, as well as your claims personnel, and they should be so advised."

[10] My question to you, Mr. Moskalski, is, a company that teaches this philosophy to all of its divisional claims managers --

MR. BELNAP: Divisional claim superintendents?

Q (BY MR. CHRISTENSEN) Divisional claim superintendents, thank you, is certainly a company that could write a memo like this to show juries in bad faith cases, isn't it?

A What that memo talks about, in my opinion -- I didn't write it -- but my interpretation of it is that the author of the document is saying that we need to recognize the realities of today's life. There are going to be lots of suits against insurance companies. And through the discovery process that's been utilized here, those documents that we write are going to be scrutinized by jurors like you, and we ought to keep that in mind as we're preparing them. And I think it makes very good sense.

Q So isn't what's going on, here, that State Farm is destroying the old documents like this, writing self-serving memos like this to show juries, cleaning up the current documents, but continuing the old practices of emphasizing average pay per claim in claims handling?

A That is not it at all. It's an attempt on [11] our part to make it clear to our people that we are not going to utilize these kinds of goals with claims personnel that have been defined there, and it's a response to a lot of criticism that you don't take action. And the irony of all this is, we sit here and take action, and we have lawyers who try to portray that as being something sinister. And that's not the case at all.

* * *

[15] * * *

Q Okay. Now, I'm going to ask you about some comments made by a Robert Williams. You've talked about document retention, and I'm going to refer to parts of the deposition of Robert Williams. Do you know who he is? Or should I explain that to you?

A If you would explain it would help me, thank you.

Q Robert Williams is a document retention expert who State Farm has hired to testify in this case, [16] and I understand he'll be testifying a few days from now, on behalf of State Farm. Do you understand State Farm has a document retention expert that's going to be presented in this case?

A Now that you've told me, I'm aware of it.

Q You didn't know before?

A I didn't know all the particulars.

Q I'll put the front page of his deposition on the screen. It appears he was deposed the same day you were a few weeks ago.

I'm now going to turn to page 29 of his deposition, which I'll put on the screen. And the underlining is something that I did. He was asked the question, "Tell me generally, what's the purpose of the document management program?"

And the answer was, "Documents are retained because, in today's business world, the volume of business activities mandate that there be, in a sense a corporate memory, that there is just too much for individuals to retain," and he goes on.

You would agree that a large corporation like State Farm, as part of their management program, needs to have a corporate memory. Isn't that a fair statement?

A I don't -- I'm not an expert in management, [17] records management programs. I, if you're talking about something that you maintain for historical purposes, I suppose that a corporation would want to do that.

Q Somewhere in the corporate memory there ought to be a copy of each manual, each claim school book and so forth, so that the later people don't have to argue about what was in those, but we can go see what's in them; isn't that a fair statement?

A No, I don't think it is. I don't think we ought to maintain records forever. It just doesn't make sense. We don't keep our garages full of junk forever.

Q But companies usually have a historical department, don't they?

A I think we do have one that looks after the memorabilia that have been created by the company over our history.

Q The testimony in this case is about all that's kept in that department is ashtrays and bumper stickers.

A That's your interpretation. I understand there are documents that are significant to the company in its history.

Q But it doesn't keep claims manuals and claim school records, does it?

A They do not dedicate thousands and thousands [18] of square feet to housing those kinds of documents.

Q Has State Farm discovered the magic of microfilm?

A Obviously we're a technologically advanced company.

Q You don't need thousands and thousands of square feet to keep copies of old manuals if you use microfilm, do you?

A You would need thousands and thousands of dollars of people, programming, assimilating that information, people who wouldn't understand how to extract that information from the system. You're still talking about massive expense.

Q All right, let me go on. This is part of that same answer that we read. And again, I've underlined, he goes on and says, "Documents really are the evidence by which businesses conduct their activities. And thus, given this need for a corporate memory, the challenge of records management seems to be able to provide, or to have available the information that you need when you want it, at the lowest reasonable cost."

I'm not sure what your answer is. You agreed that a legitimate document retention program should have a corporate memory aspect to it?

[19] A I think the operational words, there, are "records and documents you need when you want them." Which, to me, connotes documents that we do keep, we keep them where we

have a business purpose, where there's a legal purpose, or where there's a regulatory purpose. And that seems to refer to those three purposes.

Q And obeying the law is certainly a legitimate legal purpose, isn't it?

A It certainly is.

Q And producing evidence in cases when the law requires it to be produced is certainly a legal purpose, isn't it?

A Whenever we're operating under a legal document to produce, or legal subpoena to produce documents, we do.

Q Let me move to page 36 of this expert's deposition, Mr. Robert Williams. He was asked the question, "Is a records management program which only retains documents which support the company's position, but destroys documents which the company considers to be difficult to defend, a proper program?"

And after an objection, he answered, "I think it's very important to understand that a successful quality records management program does not address the [20] issue of content of documents. It addresses the issue of managing documents.

"In your question, as I understood it, there was a question of value. Something that would be good or something that would not be good, and that is never part of a successful records management program."

Do you agree with that statement?

A I have no way of telling you one way or the other, because I don't know anything about records management. I can tell you this, that in terms of the records that we keep for those three purposes, business, regulatory, or legal, that we make no effort to determine good from bad. We produce the records that we're supposed to produce, we keep the records that we need to keep.

Q All right, let me move to the next page. He was asked the question, "Companies need to keep that evidence, as you pointed out, because people turn over, memories are not as good, but the records will always be there?"

And his answer was, "That is the thinking behind the term 'corporate memory.' It is people independent."

A proper records management program doesn't take the approach of having people deny that something [21] was in a manual. A proper approach is to have the manual so that people can see what it says, isn't it?

A No, it isn't. I think our program that we have for updating manuals to keep people working with the most current manuals made a lot of sense to me. I see no problem with defending it. It was a good program, it is a good program, and I still support it.

Q Now, Mr. Moskalski, in your direct testimony you said that the regional plans are really your PP&Rs.

A Yes, I did.

Q You don't do actual PP&Rs in the position you're in?

A No, I don't. That reflects what I plan to do for a year, that regional plan.

Q That was also true when you were deputy regional vice president in Texas?

A I think the general feeling among the executives, whether they're the regional vice president, or whether a vice president of operations, or vice president of agency, is that we view that as our document, that we're committed to for a year.

Q Do you still have your regional plans from prior years?

A I can't tell you how far back I have them. I would feel comfortable saying I have them for two or [22] three years.

Q And the corporation would keep those for a considerable amount of time, wouldn't they?

A You mean other than in my office?

Q Yes.

A I don't know.

Q Now, we don't have those. We neglected to ask for those. If we had your regional plans, we'd see average pay per claim goals in there, wouldn't we?

A You might see some discussion of us being able to have an awareness of all of our statistical goals, because they do enter into the price of our product. But you would not specifically see in that plan a reference to reducing average pay by a certain percentage. That would not be there.

Q But we'd see average pay per claim discussed in those, wouldn't we?

A We'd see -- I don't know that we'd see average claim. We'd see discussion of claim costs in those documents.

Q Which another term for average pay per claim.

A No, it's a term used so that we're aware of those costs that we have in the operating of a business. Just like you would need to be aware of all the costs that you have in your personal lives in terms of your [23] budget. If we're not doing that, we're not being a very responsible business, in my opinion.

Q Let me move to another area. I think you testified on direct exam that because State Farm continues to get bigger, to grow, that you must be handling your claims right, because people wouldn't settle for less than what's reasonable. Do you remember saying something like that?

A Something to that effect.

Q That's not necessarily true, is it? There are a lot of --

A I wouldn't have said it if I didn't believe it.

Q There are reasons people would settle for less than is fair. Let me suggest some to you. What if they're deceived, they think they're getting what they're entitled to, and they're not?

A That's not what we do. You're conjecturing, and that's not what we do at State Farm.

Q What if the people just don't know? They're not experienced in claims.

A Again, you're trying to misrepresent. We have an obligation to be fair to everyone. And the policy holders as well as claimants, and we are.

Q As far as you're aware, nobody's been treated [24] unfairly at State Farm.

A You asked me if I knew of any individual case where somebody had been treated unfairly, I told you I did not know of any, that any time that there's a complaint, anybody expresses any sort of grievance to me, we have a system in place that allows us to follow up on that and to take whatever corrective action may be necessary as a result of a mistake that somebody made.

Q You don't keep those complaint files very long, do you?

A Yes, I do.

Q Do you know we've requested those in this case?

A The claim files?

Q The complaint files.

A I don't recall that you've requested the complaint files.

Q We don't have them.

A I don't believe you requested them.

Q I think we did. How long do you keep them?

A At the time that I gave you my deposition, I told you that I felt comfortable I had the files for at least three years. As I went back and checked, I have them for a longer period of time than that, even.

Q Getting back to this question of reasons [25] people may settle for less than is what's fair, some people who just had a bad accident or a problem just aren't in a position to wait for money. They need it right then; isn't that true?

A I would assume that there are people who need it right away, and that's one of the reasons for programs like first contact settlements, prompt contacts of people, is to get out there as soon as we can so that they know there is a source for that money, whether it's expense advance, or whether it's a settlement. They don't have to make a settlement of a case, they take an expense advance.

Q Some people take less than what's fair because they get worn down. They don't want to fight any more; isn't that true?

A That's not what we do at State Farm, and that mischaracterizes our policies and programs.

* * *

[28] * * *

Q You also said State Farm pays everything it owes. Full value of claims. If we could look in those excess case files, we'd discover State Farm didn't pay, in many instances, what the jury awarded, wouldn't we?

A We could look at individual cases -- We have to make a judgment in keeping our promise to our policy holder to pay what he or she is legally liable. We have to make some sort of determination as to what we think a jury might do with that case. We can't be accurate every time we do that. It's against --

Q I think you missed my question. Even after the jury said what the case was worth, we would find State Farm didn't pay it, in at least some of those files, wouldn't we?

A I think most cases would show that we paid what the jury came in with, and other cases it might show that we negotiated a settlement. I see nothing [29] wrong with that.

Q But you paid less.

A That we negotiated a settlement. There's nothing wrong with negotiations. You're trying to mischaracterize it as something evil. It isn't. It's part of life that all of us share in.

Q You said what juries award is what the claim is worth. Now you're saying you feel free to pay less than what juries award.

A I don't think you can look at any individual jury award and say, "In all cases that have these kinds of injuries, this is going to be the value of the case." You have to take jury awards in toto and look at them and say, generally, "What are juries going to do with this?" You can't look at an individual case and say, "That ought to be the guiding principle from here on out."

Q Now, you testified that the Campbell case has your full attention.

A It certainly does.

Q But when I started to question you, you said you hadn't even read the file.

A At the time my deposition was taken, I had not read the claim file, that's correct. Since that time I've reviewed volumes of documents.

[30] Q That was just a few weeks ago.

A That was on April 26th.

Q Do you know how old this case is?

A Yes, I do.

Q Your sudden interest in this case doesn't have anything to do with this trial, does it?

A Obviously when you're subpoenaed as a witness to appear and tell the truth, obviously it's going to get my attention. As it would anybody sitting here.

Q Now, you made a point on direct of saying that the claims manuals that we've been looking at, that were apparently effective in 1989 when Mr. Short found them in his office and produced them, you made a point of saying they're obsolete?

A Mr. Short, first of all, did not just find, suddenly, these files in his office. He went out and conducted a search for them. And you mischaracterized what he did.

Q Well, I think you're misunderstanding. Back in '89 I think his testimony was, when we asked for manuals, he looked around the office he was in, and produced the ones that were current in '89. That's the ones I'm talking about.

A My understanding, he thought he was honestly complying with the subpoena.

[31] Q It was later in '95 that he made the search you're talking about.

A Okay.

Q I'm talking about '89.

A Okay.

Q You made a point of saying these are obsolete. Do you admit there are things in these that are wrong?

A I don't know what's in there.

Q Well, for example, the instruction that you can get half the people to settle their personal injury claims for just having their medical bills paid?

A You'll have to show me what you're referring to.

Q Okay.

MR. BELNAP: Are you going to Article 12?

MR. CHRISTENSEN: I'm sorry, I'm in 14, that's why I'm not finding it.

Q (BY MR. CHRISTENSEN) I'm on page 6 of Article 12. It's in Exhibit 56.

A Page 6?

Q These actual loss settlements -- Actual loss is really not quite an accurate term, is it? Under the law, when someone is hurt their actual loss, the law recognizes, is their medical bills, their past lost [32] wages, their future lost wages, their pain and suffering, and compensation for having the quality of their life less than it would have been. Isn't that a fair statement?

A Well, that's one page out of context, but this is -- First off, it's an outdated book. But it talks about actual loss, but it's really in an article that deals with the settlement negotiations of liability claims. They could be bodily injury or they could be property damage.

Q Well, in a case where -- Let's take Mr. Slusher's, for example. His medical bills were about $20,000, do you understand that?

A That's my understanding.

Q If he had settled for, quote, actual loss, he'd have received $20,000 for his claim.

A Well, it's ludicrous to think that he would settle for that amount.

Q But apparently 50 percent do, if you use this technique.

A I would have no doubt that 50 percent of the claims that we handle are settled on first contact. Because that would include property damage.

Q Well, this is talking about medical expenses. Let me walk you down through it. "Have the claimant [33] assemble record of expenses due to accident. Review them one at a time. Ask questions to verify. Appropriate comments on large expenses. When properly qualified, list on paper. When all listed, check to make sure tote, total up. Ask claimant to check addition. While claimant checks, prepare release in amount determined. When claimant says, 'Correct,' produce release, 'I'll need your signature and that of your spouse while I prepare the draft.' Then prepare the draft while the claimant and spouse get release properly executed. You will lead and direct the claimant. Claimant never has to face an issue. This approach will settle 50 percent of your claims for actual loss, will result in lower demand than the rest. Claimant is oriented to specials," which means he's not thinking he's entitled to generals, right?

A I don't know what the intent of the writer was.

Q "And sees value more realistically." Do you see anything wrong with that?

A What that was, was a word track, and it's in an outdated article that someone wrote that I never used. I don't know of anybody who used that word track. It was a way of explaining the method that could be utilized on a first contact settlement. I just never [34] saw it used.

Q Mr. Summers said he used it all the time. And if he did, he was simply following the State Farm manual, wasn't he?

A Mr. Summers has a big ax to grind.

Q You're suggesting, even though this manual was current in 1989, nobody was using it?

A That's what I testified to, and that was the case. It was suggested in there as kind of a word track sort of thing that somebody had written, and no one really paid that much attention to it.

I think, more importantly, we need to understand that's not State Farm, even if it could have been interpreted as State Farm's procedure in those days, that's an outdated manual. That's no longer in use.

Q Are you aware of any memorandum instructing people not to do that, or any written policy saying, "Don't use this technique any more, it's not fair"?

A The obsoleting of that whole manual, I think, speaks for itself. It says, "This manual is no longer to be utilized, here's a new manual."

Q Most of the time when you come out with a new manual, you don't really come out with a new manual. You just come out with a new section, right?

[35] A Sometimes. Sometimes we go with a brand new manual. It just depends. For example, the PP&R program that you talked about, each time had a new manual.

Q There's a difference between coming out with a new manual and saying, "Don't do the old things any more," isn't there?

A The fact that we have a new manual and it says, "These are the procedures of this company today that we want you to follow," means that any procedures you have that are out there, that are old, ought not be followed.

Q That's just implied?

A I don't know of any words that said that. I think it's a pretty obvious conclusion that a reasonable person, people can come to.

* * *

[36] * * *

REDIRECT EXAMINATION BY MR. BELNAP:

* * *

[47] * * *

Q I want to move to another item, Mr. Moskalski, and that is yesterday you indicated to this jury that, as far as this region and you are concerned, from your review of this file, that you can state that there have been some lessons learned by State Farm, and one of those lessons you indicated to Mr. Christensen will take place from this point, forward, and you referred to that as being a letter that you will supply to an insured. Do you recall that testimony?

A That's right. I referred to it as a peace of [48] mind letter.

Q Now, you indicated that in a situation where an insured may have purchased a policy limit of a certain amount, whatever that is, and if they get sued, they are entitled under the policy, and you're required to provide them a defense, and to pay; is that correct?

A That's correct.

Q And if State Farm makes the decision on this particular case that it's not appropriate to pay, because there's no liability, or there's not a valid claim, or whatever the reason for that is, and you're going to take the case to trial, can you tell the jury if there's been an offer to settle this case, we're talking --

A An offer within the policy limits?

Q Within the policy limits, can you tell this jury, if you've made a decision to go to trial, what it is from this point that State Farm is going to tell the person that we're talking about, here, that's an insured that will be involved in this trial? Can you tell us what State Farm is going to tell them?

A Basically what we're going to say is that, "We think this is a case that needs to be tried. We've had a demand within your policy limits, and we know that you might be concerned about

that. We're telling you [49] that we're going to trial, and in doing so, we recognize the risk involved. We're willing to accept the consequences. And if this comes in greater than your policy limits, we're going to step forward, file a full supersedeas bond if the case has to be appealed, or we'll pay it in full, so that you have no responsibility."

And what that really means in this case, is that the Curtis Campbell case will never occur again.

Q You now, Mr. Moskalski, you are saying that today, in court -- And let me represent to you, and I think counsel would stipulate to this, in a court proceeding, we receive from Ms. Wilson a transcript of this case each day. And what you have just said is a commitment, in writing, on the part of State Farm. Is that how you understand it, sir?

A I understand that I'm committed in that. But beyond that, I am personally committed, which I think, to me, has greater weight. It's a commitment I've personally made, a promise that I've personally made as the regional vice president of this region.

Q And given the fact, Mr. Moskalski, of the practice of this company, in the cases that have been involved in this region since you came here in 1989 that have been paid and resolved that resulted in an excess, [50] can you tell this jury why State Farm, through your decision, is willing to do this for its insureds in the future, in addition to what's been done in the past?

A This is a stepping forward. It's a recognition, as we've talked on several occasions, about things evolving in the business world, things evolving in the insurance world. This is a recognition of that evolvement, it's a recognition of some of the concerns that policy holders may have, and it's our attempt to respond to those concerns in a responsible sort of way.

Q Is this a commitment that you are making for this region, Mr. Moskalski?

A The three states that I have the responsibility for, are the regions I can make that decision in, and I have made it independently.

* * *

[51] * * *

Q I want to move to a different area, Mr. Moskalski. Yesterday Mr. Christensen asked you about a time when you were in the state of Texas. Do you recall that basic subject matter?

A Yes, I do.

Q And asked you about, or read to you and referred to you four cases that State Farm Fire and Casualty was involved on homeowners' claims, and State Farm Lloyd's was involved on another homeowners claim. As you indicated to him, you did not have a recollection of those cases, as I understand it; is that --

A That's correct.

Q And do those homeowners' claims have anything to do with the Campbell case as he represented those facts to you?

A They don't have anything to do with the [52] Campbell case, as has a lot of testimony I've given here, from performance planning and reviews, to appearance allowances, to after-market parts, I don't see the relevance of any of those things to what happened to Mr. Campbell.

Q All right, I want to talk to you about something that was not discussed with you on that issue, and he asked you about claims in the state of Texas, and the number of excess claims that you were aware of, and made a reference to a number to you from his research.

I want to ask you, Mr. Moskalski, if, over the evening, you have asked, at your direction, to be provided with an indication of how many claims were handled in the state of Texas between the years 1980 and 1995.

A Yes, I did. I got in touch with my director of management planning and information. I was curious to see, in terms of if those were mistake files, what have the total amount of, what were the total amount of claims we handled during that period of time.

MR. CHRISTENSEN: I think he misspoke. I don't want this to be misleading. I don't think you intended -- I referred to, I think it was fourteen excess claims. It was bad faith and punitive damage type claims.

[53] MR. BELNAP: Well, that may have been what you said, or that you were referring to.

Q (BY MR. BELNAP) But I want to talk about the number of claims that were handled. And did you, out of that list of '80 to '95 year time periods, let me represent to you that I did some addition just for the years 1984 through 1995, and do those total 9,808,000?

A Yes, they do, that was the number of claims that were handled, as best I could tell, during that period of time that Mr. Christensen had identified potentially fourteen errors.

Q Now, if we take the fourteen cases that Mr. Christensen referred to, and we do some mathematics, does it work out to be -- and I can't state that number, I need to go back to school, I guess -- but does it work out to be a small fraction of a thousandth of one percent?

A That's what it appears to me. As I said earlier, lawyers aren't that good at math. But that's a whole bunch less than 1 percent.

Q And you have admitted to this jury that you're not denying that from time to time State Farm may make an error in judgment, or a mistake?

A We're a company of human beings, and human beings are going to make mistakes. We all do.

Q I want to move into another area. When [54] Mr. Fye was here on cross examination we talked to him about the fact, and he admitted, that of this surplus figure that he has represented to this jury, that this is a compilation of all of the insurance companies that are required to be listed on the annual financial reports of State Farm Mutual Automobile Company. Do you understand that?

A It would be all the subsidiaries.

Q All right. He also admitted that, of this surplus, that approximately one half, or $12 billion needed to be subtracted from this for purposes of assigning that under accounting purposes

to these other subsidiaries for their potential losses under the accounting procedures. Are you aware of what I'm talking about, that this, that in reality, what we have in the auto company is $12 billion of unassigned surplus?

A That means that basically it's surplus for the automobile company.

Q All right, and the rest --

MR. CHRISTENSEN: I'm going to object. I don't know how much is this witness' testimony and how much is simply the leading that's going on. But I'm going to object to the leading.

MR. BELNAP: I'll try and rephrase it if it's [55] objectionable.

THE COURT: Rephrase it.

MR. BELNAP: I'm just moving along and --

Q (BY MR. BELNAP) Are you aware, Mr. Moskalski, if, as to what is the unassigned surplus of the auto company?

A It's my awareness in the general way that that $12 billion, it may be something a little over that, would reflect the surplus for the automobile company.

Q All right, now, Mr. Christensen, yesterday used an example that if there are 14 million claims processed a year, and if you underpay those claims by $100 apiece, that that would yield a $1.4 billion figure. Do you recall that testimony?

A Yes, I do.

Q Let me ask you, Mr. Moskalski, if you were to take the plaintiff's position in this case, and you, as an executive, say to your people, "Don't worry about expenses, don't worry about anything that has anything to do with statistics, just write out whatever you want," and I want to use that as a basis for this question, if you were to overpay claims by $100, would that, then, become an item to that extent that is taken off of the availability to be there to protect policy [56] holders?

A Not only that, if we would act so irresponsibly as to overpay, you'd have the $1.4 billion on the other side of the

equation, it would be removed from our ability to have backup monies for policy holders. But eventually it gets translated into the price of our products that we charge our policy holders.

Q I'll also represent to you, Mr. Moskalski, that in Mr. Fye's testimony, in this transcript, he admitted that calculations of people that were involved in the Hurricane Andrew disaster were, that if that hurricane had gone approximately twenty or thirty miles to the north and had run through the populated area of Miami, that the loss to State Farm companies would have been in the range of $14 billion, instead of the four to $5 billion that occurred. Are you aware of that?

A Yes, I am. They did different models on that storm, and moved it north into the Miami area, where there were more people, instead of Homestead, Florida. Those were the projections.

Q And if we take Mr. Fye's own testimony, where he admitted that these numbers are overstated when you consider --

MR. CHRISTENSEN: Your Honor, I'm going to object to this. This is not only leading, it's simply [57] standing here representing other evidence. It's not proper for direct examination.

MR. BELNAP: It's redirect, Your Honor.

THE COURT: Well, I'm looking for that. Why don't you make an argument as to why this is within the scope of cross.

MR. BELNAP: Because, Your Honor, these numbers were used, there's three pages of numbers that were used by Mr. Christensen in his analysis, financially, of how State Farm is proceeding to cheat people, and I think it's entirely probative to point out the opposite, and some other issues that were not considered.

MR. CHRISTENSEN: Your Honor, I simply pointed out the temptation to underpay claims, and the premium income was part of the income equation. I didn't get into Hurricane Andrew, and a rehash of Mr. Fye's testimony. The jury's heard that.

MR. BELNAP: Well, these exhibits --

THE COURT: I'll allow that. But let's not overdo it.

MR. BELNAP: Let me get back to where I was. Thank you, Your Honor. I feel the gentle boot of the court.

THE WITNESS: Me too.

[58] Q (BY MR. BELNAP) Mr. Fye admitted that this number is approximately half, when you take out the surplus that has to be assigned to the other companies. And if you consider this issue that is potentially lurking out there, Mr. Moskalski, when you put up these huge numbers on the board, does it fairly characterize the fact that this company has large numbers to meet the commitments that are out there?

A I guess there's a real-life example sitting out there, she's called Big Bertha in the Atlantic right now, and those dollars potentially, the way she's working, could be consumed in a storm like that.

Q Now, let me just ask you, Mr. Moskalski, we talk about the fact that this company, using Mr. Christensen's numbers, processes about 14 million claims a year. Can you tell us approximately how much money is spent a year, if we were to be very simplistic and say that we have a checking account, and we have money running through, and at the end of the year we want to total how much we've spent, can you tell us approximately how much State Farm spends a year on handling 14 million claims?

A You know, I don't have the company figure in mind. I can tell you that within Mountain States, where I have the knowledge, that it will approach six or $700 [59] million a year.

* * *

[60] * * *

Q (BY MR. BELNAP) With respect to the questions that were asked to you about Article 12, do [61] you recall our discussions yesterday about no-fault that we had with the jury?

A Yes. Yes, I do.

Q And we talked about the fact, in a state, which Utah is, a no-fault state, that these provisions that were put up on the board about first contact settlements in a bodily injury arena, are they relevant at all in a no-fault state?

A No, they're not. You just don't have first contact settlements, where you have to have those kind of expenses incurred. And it just doesn't make sense at all. It's the same thing as we're doing with a lot of the documents. We're trying to come in here, the plaintiff is --

MR. CHRISTENSEN: I'm going to object. This witness is volunteering a speech, now, that goes way beyond the question.

THE COURT: Sustained. That editorial comment is stricken.

* * *

[62] * * *

Q (BY MR. BELNAP) Okay, do you recall Mr. Short's PP&R put up on the screen yesterday?

A I recall that language. I don't recall whose it was.

Q Okay. "I will review, evaluate, and analyze all statistical data available pertaining to my unit. I will focus on factors that impact this data and be able to explain and be accountable for the changes in this data."

And it goes on over here. Is this a report that he's making?

A It looks like it has a date, it's kind of blurred, but it looks like it's a quarterly followup of [63] on the goal itself.

Q And he says, "As I receive statistical data, I am reviewing the same to see what trends and what the effects are for my unit. I am working to understand changes in the data and how the same affects our units."

Now, do you see any problem in having a manager have statistical data that is supplied to he or she?

A None whatsoever. It's like looking at your budget. You have to have that.

Q Is there statistical data that superintendents are provided that deal with issues that aren't even in financial numbers, so to speak?

A Very much so. And that goal even goes beyond that. It's asking them to be aware of everything they get, from the cost of the company cars to their salaries, to the cost of their indemnity. It's saying, "Take a complete statistical look at your unit and analyze what those statistics may be telling you."

Q Now, is this contrary to anything in the 1992 PP&R book?

A No, it isn't.

Q How about the 1994 Coffey memo?

A I don't think it's contrary to either one of those. It's good management, to me.

* * *

[65] * * *

These are documents from claims offices that were part of the materials that were shown to you. In Houston, for instance, when they were asking for some input in piloting this program, is there any discussion in Houston about what effect that had on average paid costs in 1990?

A None whatsoever. It talks about claim activities, legitimate claim activities.

Q Quicker setup time to contact investigation?

A Right.

Q Increase number of files closed?

A Right.

Q Fewer phone calls?

A That was one of the benefits of the proficiency program, is that it allowed services to get out there much quicker.

Q How about San Francisco's experience with this pilot program? Quicker setup time, eliminates bottlenecks?

A Again, the efficiency items that we were looking for in the proficiency program.

* * *

[67] **RECROSS EXAMINATION BY MR. CHRISTENSEN:**

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Q (BY MR. CHRISTENSEN) Why are first contact [68] settlements in Utah PP&Rs if they have no application in a state that has no-fault?

A I talked in terms of what the no-fault was right now, and that's that it has a $3,000 threshold. In 1981 -- This is actually '83. In 1983, my memory is that that threshold was $500, so there would be more opportunity for first contact settlements. And that's the only explanation I can give you, and that seems to make a lot of sense to me.

Q Well, this is the current program, isn't it, BI Proficiency Program?

A Yes, it is.

Q And it stresses first contact settlements, doesn't it?

A It stresses proper contact.

Q Do you see this, same day contact?

A I need to look at it. I don't know that that's what it says.

Q It says, "By contacting the claimant and insured promptly, first contact settlements should increase."

A That is a, although I haven't read it, that is a booklet and an introductory manual that is prepared for the entire country. Not all of the country has a no-fault law, so that there are jurisdictions in which [69] that would be entirely appropriate. There are jurisdictions it would be inappropriate, and that's the reason the region has to make a decision about what makes sense in Utah, Colorado, and Wyoming.

Q Are you admitting that first contact settlements have no place in Utah?

A I'm saying that they are very rare. I can give you an example of when a first contact might occur, and as you recall, we had a discussion yesterday or the day before about the fact that first-personal injury protection carriers have a right to

subrogate against one another, against the at-fault party, and in those situations I do understand that, where the claimant wants to make a claim against the liability carrier to avoid having to go through all that paper work, that we will sometimes consider that.

* * *

[70] * * *

Q (BY MR. CHRISTENSEN) Mr. Moskalski, this is a PP&R on Bob Noxon, who was the divisional claim superintendent in Utah.

MR. BELNAP: What year is that?

MR. CHRISTENSEN: It's December, '82 to December, '83. This is one that apparently was just recently located.

Q (BY MR. CHRISTENSEN) Mr. Noxon's PP&R has -- I'm looking at control number 21200 -- it says, "See chart for specific cost goals." Do you see that?

A Yes, I do.

Q And then we turn to the specific cost goals, and you see some average paid A. I don't know what that means. Is that a kind of coverage?

A That's liability coverage.

Q So that's average paid BI?

A Yes.

Q He has goals for that, and it looks like he's actually, in the first quarter on this, was on goal. He was reducing his average paid BI. Is that the way you read it?

A Not necessarily it was reduced. That was a statistical figure that was as a result of all the [71] claims that were handled individually leading up to that.

Q But it's less than it was the year before, isn't it?

A Yes, according to -- Well, actually, it's -- We need to get it straight. This is the goal. This appears to be last year's figure.

Q So the goal is to pay less. Aren't we reading that right?

MR. BELNAP: Can I come look at what you have?

THE WITNESS: The goal is to statistically look at it, and that was the figure he was projecting based upon what he saw as his history, what he saw coming in the future.

Q (BY MR. CHRISTENSEN) But it's less than the year before?

A Not on individual cases. It happens to be a statistical figure that's less, but it has no relationship to individual cases.

MR. BELNAP: It's broken out --

Q (BY MR. CHRISTENSEN) His first quarter's less, but it's an average pay per claim goal.

A It's a very old PP&R, it goes back to the old program.

[72] Q Okay, but my question now is this. You've testified that division managers aren't part of claims management. Who signed Mr. Noxon's PP&R with those claim goals?

A The individual who's supposed to. He's a division manager who has the responsibility for that claim section, his name is John Martin.

Q And he's the division manager.

A He's a division manager.

Q That has nothing to do with claims management.

A He has the responsibility for those people, the ultimate responsibility, as I've already testified.

Q You mentioned a peace of mind letter that henceforth is going out?

A That's correct.

MR. BELNAP: Your Honor, this was inquired into on cross, and --

MR. CHRISTENSEN: He raised some new areas here, and again, I'm going to be extremely brief.

THE COURT: I'll accept your representation it's a new area.

Q (BY MR. CHRISTENSEN) Where's the written policy? Who's it been sent to that says that?

A I never said there was a written policy. I [73] told this jury that I had made that decision, as the regional vice president of Mountain States. That policy has been utilized in three cases already. We haven't sent the letter, but we have gotten in touch with the policy holder and assured them up front, just as we would in a letter.

Q That's going to be for the whole State Farm organization?

A No, I said it was for the Mountain States Region. I made that decision for those three states as its chief executive officer.

Q Okay, very quickly moving to another area. You apparently were able to get detailed information out of Texas by one phone call last night on claims.

A I was able to find out how many claims had been handled in Texas during the period of time that you had in question.

Q But when you were designated as a 30-B-6 witness on awareness of punitive damage and bad faith verdicts, you didn't get anything.

A Because I have already testified that we have no record of those.

Q And isn't --

A We do have these records, they're in the computer.

[74] Q That's exactly why it's unfair for State Farm not to keep the records, because we can only find the tip of the iceberg; isn't that true?

MR. BELNAP: Your Honor, I'm going to object. This is beyond the scope, and I'd move to strike.

MR. CHRISTENSEN: It's not either. He brought in some Texas statistics this morning.

MR. BELNAP: This was opened up on cross, Your Honor.

THE COURT: I'm going to overrule the objection, but let's move on. I think that's enough.

MR. CHRISTENSEN: I'm trying to be very rapid.

Q (BY MR. CHRISTENSEN) You understand that we're only able to find fourteen bad faith and punitive damage verdicts in Texas by very limited database --

A Well, you have your whole network of plaintiff's lawyers.

MR. BELNAP: Same objection, Your Honor. Your instruction was to move on.

MR. CHRISTENSEN: This is out of the Westlaw database --

MR. BELNAP: Your Honor --

THE COURT: Just a minute, overruled. What's your question?

[75] Q (BY MR. CHRISTENSEN) Mr. Prater's testified the tip of the iceberg, because we can't find all these. Isn't that true?

MR. BELNAP: Your Honor, that misrepresents, and I'd move to strike.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Isn't this exactly the reason State Farm doesn't keep records of punitive damage and bad faith verdicts, so that you can come in and only have to deal with what we can find?

MR. BELNAP: Same objection, Your Honor.

THE WITNESS: That is not.

THE COURT: Overruled, but that's the last question in that area.

THE WITNESS: That is not the reason we don't keep the records. We have never seen a need to do it, and you're trying to construe the fact that we have no problem in that area, perceived problem that's significant, as being something that's evil, and that's not the case. And I've already told this jury that it would be my recommendation so that we can, in fact, in the future tell our story accurately, that these records do be kept.

Q (BY MR. CHRISTENSEN) Two quick areas. I want to ask a quick followup on this. You're not [76] pleading poverty on the part of State Farm, are you, as you talk about these numbers?

MR. BELNAP: Your Honor, could I voice an objection?

THE COURT: You may.

MR. BELNAP: On the basis of the bench conference?

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Let me ask this, if I may. You've mentioned you need all this money for hurricanes?

A I just used that as one example.

Q There have been a lot of hurricanes and earthquakes during these years that are shown on this chart, haven't there?

A Off and on there have, yes.

Q The biggest recorded catastrophes in history have occurred during these years, haven't they?

A Many of them.

Q Final question. If State Farm pays fourteen to $15 billion a year in claims, if it can even underpay those claims by 5 percent, that's a lot of money, isn't it?

MR. BELNAP: Your Honor, I'm going to object on the basis of the bench conference.

[77] THE COURT: Sustained.

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EXCERPTS OF TRIAL TESTIMONY OF STEVEN B. NEBEKER, JULY 11, 1996

[Vol. 22, R. 10277, commencing at p. 84]

* * *

STEVEN B. NEBEKER called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

[85] **DIRECT EXAMINATION BY MR. BELNAP:**

Q Mr. Nebeker, now that you've been placed under oath, will you tell us your full name and what city you reside in.

A My full name is Steven Bennion Nebeker, I live in Salt Lake City, Utah.

Q And Mr. Nebeker, are you a lawyer?

A I am.

* * *

[86] * * *

Q And have you been hired in this case by our law firm to render opinions and talk to this jury as an expert?

A Yes, I have.

* * *

[96] * * *

Q Now, I think it's important to understand, and it's perhaps obvious, and forgive me if it is, ladies and gentlemen of the jury, that as an attorney, were you asked to try and put yourself in the position of evaluating this case, based upon what you saw in the file that would have been facing a person making decisions, without, so to speak, the knowledge of what the Logan jury did in hindsight?

A Yes. Yes, that was my charge.

Q We know that the verdict occurred in Logan in 1993.

[97] MR. HANNI: '83.

MR. BELNAP: '83, excuse me.

Q (BY MR. BELNAP) With respect to the decision of the jury last fall, you're obviously aware that they decided that there was a substantial likelihood that when the case was tried there would be an excess verdict; is that your understanding?

A That's my understanding.

Q And that State Farm reasonably should have settled the case. Do you understand that?

A Yes. I do.

Q Now, Mr. Nebeker, in your experience as a lawyer, as you have attempted over the years to evaluate cases that have not been able to be settled, for whatever reason, and they proceed to trial, do you attempt to use your best judgment?

A I certainly did.

Q Do you wish sometimes you had a crystal ball, so to speak?

A Absolutely.

Q Have you ever been wrong?

A I have been wrong.

Q And in that regard, Mr. Nebeker, I want to make something as clear as I can from your opinion, if you have one. And that is, in regard to an opinion that [98] another lawyer from California, a Steven Prater testified a week or two ago about, who indicated that in his opinion, the fact that the jury decided against State Farm in October of 1995, or that State Farm lost the case last fall on that decision, that that equals a finding of dishonesty. All right?

And I want to ask you, Mr. Nebeker, if you have an opinion whether or not the simple finding of that jury, that verdict last fall, equals in any way a finding of dishonesty?

A In my opinion --

MR. HUMPHERYS: Hold on just a minute. We would object, Your Honor. Maybe Paul's memory's better than mine, I'm not sure Mr. Prater said that. But I think it's not appropriate for Mr. Nebeker, an expert, to comment and interpret the court's order and judgment in this case and a finding of the verdict.

MR. BELNAP: That is not what I'm doing, if I could explain, Your Honor.

THE COURT: Let's do it at the bench.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. BELNAP) Mr. Nebeker, let me give you some background, because you've not sat through this trial, that will lead up to the question that I had [99] posed to you.

Mr. Kingman a few weeks ago testified that in his opinion, looking in hindsight, and realizing that he couldn't stand in the shoes of the people that were there, but in hindsight he would have settled this case, and that there was discussion, in essence, that he believes that implied that there was a mistake made in that regard.

There was then testimony, based upon that representation, Mr. Nebeker, there was testimony from a lawyer from California who indicated that the finding of the jury last fall, in determining substantial likelihood and unreasonableness equated to what he called the words "bad faith."

And I'll represent to you that this person, in essence, indicated that the finding by the jury last fall of bad faith was equivalent to a finding of dishonesty, so that State Farm could not claim they had made an honest mistake, because the jury had determined through that, that there was a dishonest mistake.

Now, with that background --

MR. HUMPHERYS: And I just want to register the objection, that that is not a true representation of what Mr. Prater said. He was talking about it being an unreasonable breach of the duty could not be an honest [100] mistake.

THE COURT: It's on the record, and you may resort to cross examination to clarify it in your mind.

Q (BY MR. BELNAP) Now, given that background, Mr. Nebeker, do you have an opinion as to whether or not, when a decision is made to proceed with a case, and there are issues involved, as there have been in this case, whether or not, if a jury determines against you, does that equate to a finding of dishonesty, in your opinion?

A No, it does not equate to a finding of dishonesty in my opinion.

Q Now, are there examples that you could use in the legal field which we may understand and may help the jury understand? And let me give you one and see if you think this is applicable.

Have you been involved in cases where a judge has made a decision on a case, one way or the other, and an appeal has been taken from that decision?

A I have.

Q And have you been involved in a case where there has been an appeal and the court above the judge, at the appellate level, has reversed the judge and said that that judge was wrong?

A I have.

[101] Q Would that equal dishonesty on the part of the court?

A In my opinion, that simply represents what the practice of the law is all about, and that is that lawyers make judgments, judges themselves render decisions, sometimes those judgments prove to be correct, and sometimes they prove to be wrong.

But that doesn't mean that the judgment that was made that was wrong was dishonest. It simply means that, as we all know, people disagree on a number of things. That's what makes this country what it is, is that people are allowed to disagree.

And certainly when you have people viewing facts, evidence, testimony, in different light, the fact that they think it's going to be, perhaps, a case that will be a winner, and they go in and lose it, doesn't mean that their judgments were made dishonestly. Their judgments, in my opinion, are simply made on the facts as they analyzed them, and that, I can't see any way that that equates to dishonesty. Because judges do that all the time.

Q Mr. Nebeker, the jury last fall disagreed with you.

A They did.

Q In the opinions that you've stated.

[102] A They did.

Q Do you believe, yourself -- and I'm being serious about this, sir -- that the opinions you stated are, therefore, dishonest?

A No, I certainly don't. I had a chance to look through the documents, to look at the testimony --

MR. CHRISTENSEN: I'm going to object to this. This is very improper. The jury last fall was not asked to decide the issue of dishonesty. That was expressly reserved for this jury. And to have this line of questioning is now suggesting through this witness that it was a finding that there was no dishonesty.

MR. BELNAP: Your Honor, this was opened by the plaintiff's witness, this is my last question on this point, and I think it's been ruled on at the bench conference.

MR. CHRISTENSEN: But you've gone way beyond, and it's misleading.

MR. BELNAP: I have not. This is the last question on this point, which we were allowed to proceed on, Your Honor.

THE COURT: I'll allow it. Overruled.

THE WITNESS: With regard to -- Could you restate the last question, please?

Q (BY MR. BELNAP) Yes, I believe my question [103] was the jury disagreed with your opinion that you were making. Trying to put aside hindsight when you were reviewing the file and coming to those opinions, does that equate, Mr. Nebeker, to, in your opinion, that you were dishonest in stating those opinions?

A I have to say that it certainly does not equate to dishonesty, because I think you have to look at what lawyers are required to do, and that is evaluate a lot of things in a trial. And you make judgments based on your experience, perhaps consulting with other lawyers, and when you go forward with those judgments, sometimes you find that you're wrong.

But that doesn't mean when you go back and look at the decision you made, that you were dishonest in making that judgment. It's simply that you viewed the facts, the witnesses, the testimony, in a different light than the other attorney did. His judgment proved to be right, your judgment proved to be wrong.

But I don't think -- Any time you go into court, you're going to find there's going to be a winner and a loser. And because one side loses, that doesn't mean that that whole side is clouded with a sense of dishonesty, because they just simply thought with the law and/or the facts that they were going to win. That's their judgment.

[104] MR. CHRISTENSEN: I'm going to object to this witness commenting on what Mr. Bennett thought. The court has expressly ruled with many witnesses that that's improper, there was a ruling on this a few minutes ago. And I object to that, and move it be stricken.

MR. BELNAP: I don't think that was his testimony, Your Honor. I'm now moving to another area.

THE COURT: That certainly is a proper instruction, if that's what I understood him to say. I didn't understand his testimony to be there. But if that was the inference that the jury drew from the answer that Mr. Nebeker gave, then they should disregard that interpretation of his answer and that aspect of it be stricken.

* * *

[106] * * *

Q All right. Let me move to a third-party situation. This jury's heard reference to the case of Pixton. Is there a duty, in a third-party situation, and I'm not talking now about the insured, I'm talking about the person that's claiming against the insured, is there a duty in the state of Utah to the third party?

MR. CHRISTENSEN: Your Honor, I'm going to object to this witness giving legal opinions. The court's going to instruct the jury on these duties.

MR. BELNAP: Your Honor, this is foundational to get to some of his other opinions and we've discussed it on both sides with other experts.

THE COURT: Overruled.

THE WITNESS: Yes, with regard to the third-party claims that are made against, for instance, [107] your own insurance company, if you're suing me as a third party, suing me in an automobile case, my insurance company has a duty to defend me, and also a duty to indemnify me to the extent of the policy limits. So that duty extends to me to protect me against third-party claims.

Q Is there a duty, in this analogy you've given, if I'm suing you, is there a duty that your insurance company owes to me, under the Pixton case?

A Only the duty to defend me, but not a duty to you.

Q All right. Now, a related item that I need to ask you for foundational purposes to some other opinions I'm going to ask you about, I'll represent to you that Mr. Gordon Roberts testified that perhaps -- and he wasn't certain of this on cross examination -- but he felt that there was the possibility that you could assign a personal cause of action, in other words, potentially Mr. Campbell could have assigned his personal claims for alleged injury and damage to Slusher and Ospital.

Do you have an opinion, Mr. Nebeker, whether or not personal causes of action for injury to ourselves, as people, can be assigned in the state of Utah?

[108] A I do have an opinion on that.

Q And what is your opinion?

A My opinion is that you cannot assign a claim for personal injuries to another party. That that's not allowable under the state laws.

Q Now, given the fact that you cannot, in your opinion, assign a personal cause of action, and moving to another area by way of foundation, under the Amerman decisions in this state, do you have an opinion as to whether or not third parties, like Slusher and Ospital, can bring a cause of action against a company like State Farm for alleged mishandling of a claim of their own insured?

A I do.

Q What is your opinion?

A My opinion is they cannot do that under the laws of the state of Utah. They cannot bring a claim for bad faith against the insurance company.

That claim would have to be brought by the Campbells, who would sue their company, but not by Slusher and Ospital.

Q All right. So Campbells are the only, or Mr. Campbell, or Mrs. Campbell, if it's appropriate, are the only people having the contract that can bring the claim; is that what you're saying?

[109] A Yes, that's correct.

Q And the Slushers and Ospitals cannot receive that cause of action to bring it themselves; is that what you've told us?

A That's correct.

MR. CHRISTENSEN: I'm going to object to that. There's not a foundation for that. He's testified you can't assign a personal injury claim. There's been no foundation that you can't judicially execute on a bad faith claim. The foundation that's laid is not the same as the question.

MR. BELNAP: I'd be happy to ask him those questions, Your Honor.

THE COURT: Proceed.

Q (BY MR. BELNAP) Mr. Nebeker, if you can't assign, in your opinion, if you legally can't assign, so that Slusher and Ospital, using their names, to bring the cause of action, if that can't be done, do you have an opinion whether you could indirectly do that by allowing them to execute against a potential cause of action Mr. Campbell might have, and become the owners of that potential cause of action? Would the law allow that, in your opinion?

MR. CHRISTENSEN: Your Honor, again, I'll object for lack of foundation. I think we established [110] through Mr. Roberts that that's an open question in this state.

THE COURT: I'll allow this witness to give that testimony.

THE WITNESS: I would think that that could not be done.

Q (BY MR. BELNAP) Why is that, Mr. Nebeker?

A Well, mainly because the bad faith claim is founded on the concept of damage that you have suffered because your insurance company didn't take care of you or didn't settle the claim. It's a claim personal to you. And in my judgment those are the type of claims that cannot be assigned. And I think you couldn't do it directly or indirectly.

Q And indirectly, would that be executing against it to try and own it?

A Yes, it would be.

Q Now, having said that, Mr. Nebeker, I want to talk to you about some correspondence and some agreements that this jury has heard and seen up to this point, and I want to put up on the board the December, 1992 letter from Mr. Barrett to Mr. Humpherys, indicating that allegedly Mr. Summers called Mr. Barrett -- And by the way, have you seen this letter before?

[111] A I have seen that letter, yes.

Q That Mr. Summers called Mr. Barrett and indicated that he had been asked to change some documents, and that he advised Mr. Barrett of that fact, and that he advised Mr. Campbell of that fact, and that there was a potential for an excess verdict allegedly, because of Mr. Summers' evaluation of this particular case. You've seen this before.

A I have seen that letter, yes, Mr. Belnap.

Q Let me just take the next step on this, and that is -- Let me go next to a January 24th, 1983 letter, where Mr. Barrett asks Mr. Humpherys, "I have not heard from you, and I feel quite strongly that this information would help our settlement with Mr. Bennett," basically, "if we were to tell him." Have you seen that before?

A I have seen that letter, yes.

Q Okay. And I next want to go to correspondence that Mr. Humpherys did respond to, where he indicated that he was not suggesting they go ahead and take Mr. Summers' deposition at this time, and make this a matter of record, but he goes on to state, "While it may be irrelevant as it relates to the personal injury claim, it would not be irrelevant in a bad faith action against State Farm after the personal injury [112] action has been concluded. Before this action can be filed, we would have to obtain a judgment against Campbells

which would exceed his policy limits and then obtain an assignment of all the claims against Mr. Campbell in return for an agreement not to execute on him personally."

Now, this assignment that's talked about, there, is that your opinion, under Utah law, that you cannot assign this kind of claim?

A They could not assign that type of a claim.

Q With respect to this assignment issue, there's evidence in this case that ultimately -- and I'm now jumping forward approximately a year or two -- in December of '84 the parties entered into an agreement where Mr. Campbell agreed to give to Slusher and Ospital proceeds from his cause of action if he received a recovery. Are you aware of that?

A I'm aware of that agreement, yes.

Q And if Mr. Campbell chooses to give away some of the money that he alleges he's entitled to, is he allowed to do that?

A He is entitled to do that. That's a different type of assignment, where he's assigning proceeds, rather than a personal claim.

Q I next want to show you a letter of February [113] 10th, 1983, where Mr. Barrett is writing back, indicating, again, that in substance, that he's wondering if they should tell Mr. Bennett about this and get the deposition taken. Is that how you read the letter?

A Yes, that's correct.

Q All right. "Although it may not be usable at trial, it may help in the settlement aspect."

A They were hoping to take it primarily for settlement purposes, as I'm reading the letter.

MR. BELNAP: Your Honor, at a time that would be convenient for ease of saving time, we'd like to be able to mark these and offer their admission. So as we move through --

MR. HUMPHERYS: They've already been admitted as exhibits in the October trial.

MR. BELNAP: We want a separate --

MR. HUMPHERYS: At least two or three -- But they are separate, counsel.

MR. BELNAP: Let us coordinate that, Judge.

THE COURT: Just work it out with yourselves and my clerk. It'll be no problem.

Q (BY MR. BELNAP) I next want to go to a May 16th, 1983 letter, where -- Have you seen this before?

A Yes, I have.

[114] Q All right. Was there some discussions that had evidently gone on in the interim between Mr. Barrett and Mr. Humpherys about settling the claims that Slusher had brought against Mr. Ospital?

A Yes, there had been.

Q All right. And with respect to this letter, does it provide that Mr. Humpherys would stay involved, that his clients would stay involved in the case, and does it go on to provide that he'll provide the necessary documents, setting forth the agreement for how the claim against Mr. Campbell should be pursued, particularly if the case is not settled and it's necessary to bring a bad faith action?

A Yes, he talks about preparing the documents, setting forth the necessary arrangement for how the claim against Mr. Campbell should be pursued.

Q Now, Mr. Nebeker, if, given your opinions that the only person that could bring this would be Mr. Campbell, if there was a judgment that was entered in excess of his policy, can -- Let me rephrase that.

Could Slushers and Ospitals expect to share in the proceeds of a bad faith action if they were to have ever executed against any of Mr. Campbell's property?

A In my opinion, they could not have done that.

[115] Q And why is that, Mr. Nebeker?

A Well, I think in order to proceed with the bad faith claim, it would have been necessary for Mr. Slusher and Mr. Ospital to have Mr. Campbell's complete cooperation in assigning to them this excess, over and above the policy limits. And if they were to go in and execute on his property, I think they would be cutting off any hope they would have that he would be willing to assign that to them.

Because then they would be trying to satisfy the judgment. And he's in a position where, if he has the claim, he can assign it, for the excess if he wants to do that. So I think that, looking on it now, it's my judgment that they certainly were hoping to get the cooperation of Mr. Campbell in getting the assignment of that excess to them, and that would, I think, preclude any attempt to execute on his property.

Q Mr. Nebeker, let me next put up on the screen, and also we have a blowup of this, an agreement that followed this letter where it said to Mr. Humpherys, "We understand that you'll prepare the necessary documents." Are you aware that the documents were prepared and reduced to writing?

A Yes, I am.

Q Okay. And this jury's seen this before, but [116] this is an agreement of June 3, 1983; is that right?

A It is.

Q Does the agreement, among other things, provide, in paragraph number 3, that "Ospital and the attorneys currently retained by Ospital," which would be the Christensen, Jensen firm and Mr. Humpherys; is that right?

A That's correct.

Q "Shall assist Slusher in the prosecution of his claim against any other party responsible," and then does it go on

to provide that, in paragraph 4 and over on to the next page, that they will divide between themselves any recovery that they get from such an agreement?

A That agreement of June 3rd makes those provisions clear, and puts them in writing.

MR. HUMPHERYS: Your Honor, I'd like to have clarified, there was no agreement to divide what Mr. Slusher's recovery may be, or Mr. Ospital's recovery may be. And I think that was not clear. But I think you agree to that, don't you?

MR. BELNAP: I don't know that that's an evidentiary objection. I think the witness' testimony is clear. If it's not, they can cross examine.

MR. HUMPHERYS: Well, what I'm saying --

[117] MR. BELNAP: I'm not trying to make anything unclear. The document --

MR. HUMPHERYS: I'm objecting to the representation in his question. If he doesn't wish to clarify it --

THE COURT: To avoid a lengthy recross, let's just clarify it now, so there isn't any problem.

MR. BELNAP: I wasn't attempting -- The agreement is sitting here.

Q (BY MR. BELNAP) And what I thought my question was, does this agreement provide for the splitting of the proceeds of any excess bad faith monies that these people may share in at a later time?

A It does.

MR. HUMPHERYS: That wasn't quite the same question, but I concede on that point.

MR. BELNAP: I thought it was.

MR. HUMPHERYS: You said any recovery, and it didn't apply to anything regarding the first case.

MR. BELNAP: You and I may not agree, but we'll agree to disagree, how's that?

MR. HUMPHERYS: All right.

MR. BELNAP: Thank you.

Q (BY MR. BELNAP) Given these agreements and correspondence that we've placed up on the board, [118] Mr. Nebeker, do you have an opinion, if we were to divide a line, here, of correspondence and agreements that were made before the Logan trial, do you have an opinion as to whether or not, given the state of the law and your legal opinions you've told this jury about, whether or not Slushers, Slusher and Ospitals could have executed against Mr. Campbell, and had the benefit of these documents that they were talking about in terms of a potential action?

A It's my opinion they could not have done that.

Q Now, given these documents and correspondence, do these documents and correspondence evidence any intent, one way or the other, as to whether or not they intended to execute against Mr. Campbell?

MR. CHRISTENSEN: Objection, it's an opinion on intent.

MR. BELNAP: Your Honor, I'm asking about the documents. He's entitled, as an expert, to have reviewed them and talk about his interpretation of them.

THE COURT: He can state his interpretation.

THE WITNESS: In my view, Mr. Belnap, they did not intend to execute on Mr. Campbell's property, because they were clearly looking toward the bad faith claim. And they knew that in order to get an assignment [119] of that bad faith claim, they needed his cooperation. It's my judgment the documents indicate they did not intend to do that.

Q (BY MR. BELNAP) Let me show you a document, now, that is after the Logan trial, in December of 1983. Have you seen this before?

A I have.

Q Does this discuss that Mr. Campbell may be approached and may be amenable to executing a covenant not to execute against himself in return for an agreement to provide proceeds from a bad faith action?

A That letter of December 7th, that last paragraph, yes, carries that concept forward in writing.

Q Mr. Nebeker, as we talk with each other, I may understand, and you may, but I want to make sure that the record's clear, if we have to go back and read this at another time. You've indicated to the jury that Mr. Campbell is the person that would have to bring the cause of action; is that correct?

A Yes, that's correct.

Q So when we talk about, when you have used the word "assignment," to be able to assign the claims and use that word, is that in terms of the proceeds, if Mr. Campbell chooses to assign the proceeds?

A Yes. That's in terms of the proceeds from [120] the excess judgment.

Q Okay. I next want to show you a letter of December 19th, 1983. And have you seen this before?

A I have.

Q This letter talks about setting up a meeting in January, January, 1983. But that must be a typo, must it not?

A It would appear to refer to January 6th of 1984, because the letter's written December 19th, 1983.

Q Okay. And in terms of that meeting, let me represent to you that Mr. Slusher and the Ospitals have both testified in this case that, following the meeting in January of 1984, they were both in agreement, in substance, that they would not proceed against Mr. Campbell, and that they would move toward, through their lawyers, entering into an agreement not to execute, and to assign, to have Campbell assign some of the proceeds of a bad faith action. Are you aware of that?

A I'm aware of that, yes.

MR. CHRISTENSEN: I'm going to object to that as mischaracterizing the several days of testimony that we heard.

MR. BELNAP: Your Honor, I can turn to the page in this chart where both Mr. Slusher and the [121] Ospitals indicated on a time line that as of January, 1984, they were both in agreement, in substance, with that concept, and the documents had to be worked out. And we can do that, if you want me to take the time to do that, counsel.

THE COURT: I'll allow the question. Overruled.

Q (BY MR. BELNAP) Mr. Nebeker, are you aware, after this January, 1984 meeting, if ultimately an agreement was executed by all parties confirming that?

A It was.

Q And in the interim, was there correspondence that was created and sent between the parties indicating there would be no execution or effort to commence a collection action while they were talking?

A Yes. They were putting the execution concept on hold until they were finding out if they could work out this agreement.

Q Is that consistent, or inconsistent with your opinions regarding the correspondence and agreements that led up to the verdict in 1983, September?

A Yes, it is. It's consistent with what had gone on before.

Q All right. And I'll represent to you, I think this is in evidence, but these same letters were [122] sent to Mr. Campbell. Do you understand that to be the fact? The December letter saying there would be no execution?

A It's my understanding that that letter did go to Mr. Campbell.

Q And was this confirmed also, in subsequent correspondence a couple of months later, or three months later, when they indicated in the March 13th, 1984 letter, that, "We've decided that since the judgment bears interest at 12 percent we'll not pursue any garnishment"?

A I think that first paragraph, Mr. Belnap, touches on the fact that they were willing to let the money stay at 12 percent, and they would not pursue any garnishment against State Farm for the policy limits pending the appeal. That's, I think, in that first paragraph.

Q And in the second paragraph, Mr. Nebeker, was there assurance that there would be no effort to levy execution on Mr. Campbell's property while they're still attempting to work out the written agreement?

A Yes, I believe, I'm just looking through that, and I think there was -- Down about the middle of the paragraph, I think it says, "In the meantime you may be assured that no effort to levy execution on [123] Mr. Campbell's property will be made until after it becomes an apparent, if it does, that no agreement is possible." So yes, that paragraph touches on that.

Q Mr. Nebeker, we've now talked about your opinions before the September, '83 Logan trial. I'd now like to ask you your opinions about the conduct after the Logan trial. Do you have an opinion, and realizing also, for purposes of foundation, that we know that there was an agreement signed in December of 1984, do you have an opinion as to whether or not the documents and the agreement evidence an intent not to execute against Mr. Campbell's property?

MR. CHRISTENSEN: Objection, it's repetitive. I think this is the third time we've covered this subject.

MR. BELNAP: No, it's not, Your Honor. This is now post judgment.

THE COURT: Overruled.

THE WITNESS: Yes, in my opinion, the documents show, looking both post Logan trial and pre Logan trial, that they did not intend to execute on Mr. Campbell's property, providing they could work out this agreement to pursue the bad faith claim. There's a consistency in those documents.

Q (BY MR. BELNAP) Now, Mr. Nebeker, given your [124] opinions, and the state of the law that if they were to have executed they could not have proceeded to attempt to get an agreement to share in the proceeds of the bad faith action, given that, do you have an opinion as to whether or not a supersedeas bond was necessary to be filed in this case?

A I do.

Q What is your opinion?

A My opinion is that it was not necessary, because they were able to work out an agreement that was going to allow them to get, proceed with the bad faith claim and not execute, and therefore if there was going to be no execution, there would be no need for a supersedeas bond.

Q Now, are there a number of times, in your experience, where parties to an appeal have proceeded with an appeal without any bond?

A That does happen, yes.

Q I want to move to another area. And before I do that, Mr. Nebeker, was this confirmed by Mr. Hoggan, when he was looking toward the January, 1984 meeting, and corresponding with Mr. Bennett in December of '83, and indicating, until that meeting there would not be able to be made a determination as to whether a bond would be necessary?

[125] A I think, in that letter of December, I think it's the 13th of 1983, he indicates that.

* * *

[136] * * *

CROSS EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Nebeker, you've been an expert in another fraud and bad faith case where I was one of the attorneys. Do you remember the Stalberger case?

A I do, yes.

Q Mr. Stalberger's wife was killed by a drunk driver down on Redwood Road?

A Yes.

Q And he had, was going at a high rate of speed, had a blood alcohol of about .221, I think, crossed over a concrete median, hit the Stalberger vehicle head on, killed Mrs. Stalberger, and injured Mr. Stalberger. Does that refresh your memory?

A Yes, it does.

Q Now, the drunk driver was driving a company car for a company called Redwood Industries, and had a big policy limit of $500,000. Does that sound about right?

A I think that's correct.

[137] MR. BELNAP: Your Honor, can we approach the bench?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. CHRISTENSEN) Anyway, Mr. Stalberger, whose wife had been killed, was contacted a few days after the accident by an insurance adjuster by the name of Ray Summers, who had left State Farm and was working for an adjusting company. Mr. Summers was hired by Redwood, or excuse me, Rockwood Insurance. Rockwood Insurance set aside $200,000 in their reserves for Mrs. Stalberger's death, $50,000 for Mr. Stalberger's injuries, and I think $1,000 to pay for the Stalberger car, which was an old car. You've seen this document before, it may have been a few years ago, but you've seen it.

MR. BELNAP: Your Honor, just so that the record's clear, we've not seen this document, but I don't intend to be jumping up every time through this case with documents we haven't seen, but this has not been shown to us.

Q (BY MR. CHRISTENSEN) You saw this when you were an expert in that case, right?

A I think I, yes, would have seen that when I [138] was testifying in that case.

Q Now, Mr. Summers gained Mr. Stalberger's confidence. He was not an educated man, he was a custodian at that time; isn't that true?

MR. BELNAP: I'm going to object, the facts of this accident, and given what the discussion at bench, are beyond the scope, and we've not seen this document either.

MR. CHRISTENSEN: This case was gone into at the last trial. We have been through hours of them putting on the screen documents from other cases with Mr. Fye, Ina DeLong, Mr. Prater. I will be brief if they'll allow me to be.

THE COURT: All right, overruled.

THE WITNESS: Mr. Stalberger did work as a custodian, yes.

Q (BY MR. CHRISTENSEN) Mr. Ray Summers was able to gain Mr. Stalberger's confidence and talk him into settling his wife's death for $32,100, his car for $900, and his own injuries for $15,000; isn't that true?

A It appears that he did settle the case for those numbers, yes.

Q And the insurance company saved $202,000, that was the total of forty-eight, and the insurance company saved $202,000 of the money they'd set aside for [139] those claims; isn't that true?

A That appears to be a document from Redwood Industries. I guess that's just the name of the insured. I can hardly read that, but it looks like that's --

Q Do you see the reserve numbers?

A Yes, I see those numbers.

MR. SCHULTZ: I object, this doesn't go to impeachment.

MR. CHRISTENSEN: Well, I'm getting there. Give me a chance.

THE COURT: Overruled.

MR. BELNAP: I think the insurer's listed as Rockwood Insurance on the document.

Q (BY MR. CHRISTENSEN) Rockwood is the insurance company, Redwood Industries is the policy holder?

A The insured, right.

Q Now, Mr. Stalberger had been told by Mr. Summers that if he'd sign a release he'd give him some money. He'd give him the $48,000, but if he had more bills to bring them in and they'd be taken care of. Do you recall that?

A I don't recall that testimony.

Q And Mr. Stalberger signed the release for his [140] own injuries and for his wife's death.

When he went in a short time later with more medical bills, Mr. Summers told him the insurance company wouldn't pay them because he'd signed a release. You don't remember that?

A I don't remember that, Mr. Christensen.

Q So Mr. Stalberger ended up getting legal counsel, he was referred to me by another lawyer, and we sued --

MR. BELNAP: Your Honor, this is beyond the scope, and it's now testimony. It's, in essence, this counsel testifying about matters that are not in evidence.

MR. CHRISTENSEN: This is all within the knowledge of this expert. He reviewed all of the documents at the time. And I'm almost through with this.

MR. BELNAP: And this expert has indicated that this alleged leaving of medical expenses open, he has no knowledge of. So there's not foundation. I mean we absolutely don't object if they want to talk about what Mr. Summers did through years after he left State Farm, that's fine. But in terms of counsel testifying, I object to it.

MR. CHRISTENSEN: This was all in the [141] depositions this witness reviewed.

THE COURT: I'll overrule the objection but ask you to proceed directly to the question that you're looking to have this witness answer.

MR. CHRISTENSEN: Okay.

Q (BY MR. CHRISTENSEN) Mr. Stalberger brought an action against Mr. Summers, Utah All Claims Insurance Adjusters, and Rockwood Insurance for fraud and bad faith, didn't he?

A I was out of the case by then, Mr. Christensen. I don't recall who the parties were to the lawsuit.

Q You were in the case.

MR. BELNAP: Your Honor, I'd move to strike the comment.

THE COURT: Motion is granted.

Q (BY MR. CHRISTENSEN) Rockwood Insurance was able to find an expert, somebody willing to come in and testify, and defend what Summers did, and say it was fair.

MR. BELNAP: Same objection, Your Honor.

Q (BY MR. CHRISTENSEN) And that expert was you, wasn't it, Mr. Nebeker?

THE COURT: Overruled, he can answer the question.

[142] THE WITNESS: I testified on behalf of the insurance company, yes.

Q (BY MR. CHRISTENSEN) And you testified that what Summers did was fair.

A No, I don't believe I got into what Summers did. I think I got into the numbers, as to what the case was worth. I have not really looked at what Mr. Summers did, as I recall.

Q You didn't read the depositions in that case?

A I don't remember reading Mr. Summers' deposition.

Q Let me see if I can refresh your memory. Part way through this fraud and bad faith case, the insurance company went into receivership in Pennsylvania, and at that point that case ended, and it turned into a suit against the bar who had served the drunk driver the alcohol. You were involved in the first part, the fraud and bad faith case against Rockwood, Summers, and Utah All Claims; does that refresh your memory?

A I think that, now that you stated that, that's what did happen. I just remember I testified, mainly about values in the case. That's what I think my opinion was given for.

Q And you --

[143] A And you tried the case against the, I think the bar that had sold the driver of the truck more drinks than they should have, and that was the case that went to trial.

Q Right. But you testified as an expert for Rockwood Insurance that the $31,000 -- Excuse me, $32,100 received by Mr. Stalberger for his wife's death was fair.

A Yes.

Q And you testified that what Summers had done was fair.

A I don't believe that I got into what Mr. Summers did, Mr. Christensen. That, I just don't remember being involved with his claim practices in that opinion.

Q Well, he's the one that got the number you defended, right?

A Well, I think what I did was I gave a range of values in the case that it would be worth something between, it seems

to me $100,000 and $150,000 for the total case. That's what I was looking at. Because there were claims of children involved, in addition to the claim of Mr. Stalberger for the death of his wife.

Q You testified that Mr. Stalberger's claim was worth no more than fifty, didn't you?

[144] A You mean for the benefit of his wife?

Q Yes.

A That's correct. But I think I put a range on it of 100 to 150.

Q Do you still have your deposition from that case?

A I don't have it with me, no.

Q Do you still have it?

A I think it's still in my office.

Q Because I couldn't find it. I looked all over for it. Have you read it recently?

A I took a look at it after the trial last fall.

Q Now, after Mr. Stalberger's claim against the insurance company couldn't be pursued because Rockwood Insurance went into receivership, we were able to get an order from the court allowing Mr. Stalberger to pursue the bar that had served the drinks to the man who had caused the accident for the death of his wife, and you're right, I did try that case. It was tried in September of 1991, a case that you put a value, a maximum of $50,000 on it. Do you recall what the jury awarded?

A I remember the number was something just under a half million dollars.

[145] Q It was $487,000 for his death claim and another $100,000 in punitives for the drunk driving.

A Yes, correct.

Q So the total was just under $600,000.

A Correct.

Q More than ten times the value that you had testified as an expert that it was worth.

A That's correct.

* * *

[153] * * *

Q (BY MR. CHRISTENSEN) Mr. Nebeker, I took a supplemental deposition from you on May 1st of '96, just a few weeks ago. Do you recall that?

A Yes, I do.

Q In that deposition -- I'm now looking at page 48 -- I asked you if you'd been designated as an expert witness in any other bad faith cases besides the Campbell case, and your answer was no. Do you want me to show that to you?

A I think that I did correct that, Roger, and say I had been designated in the Rockwood case.

[154] Q Do you see that?

A I see that, yes.

Q Now, the Stalberger case is one that you were an expert in, right?

A Yes, I was.

Q Weren't you also designated as an expert in a bad faith case against State Farm, Smith versus State Farm, in West Virginia?

A I was designated as an expert witness in that case, yes.

Q Here's a document filed with the court in West Virginia. Is that your signature on it?

A That's my signature, yes.

Q And the date of that's July 5th, 1995?

A That's correct.

Q Was that the case with the $50,000 policy limits, and the young man that was paralyzed?

A I'd have to go back and look at that file to see what that case was about. I know I submitted an affidavit, and then that case was settled.

Q And you were an expert for State Farm in that case?

A I was asked to be an expert, yes.

Q And that was a large excess verdict case, wasn't it?

[155] A I believe it was.

Q Something like $20 million?

A I don't know the number.

MR. BELNAP: Your Honor, can we approach the bench, please?

MR. CHRISTENSEN: The verdict in the case was $20 million, but Mr. Prater's testified to it.

MR. BELNAP: Your Honor?

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. CHRISTENSEN) Let me clarify my last question. I suggested to you a $20 million excess verdict. That was against the State Farm insured, not against State Farm. In other words, it would be comparable to an excess verdict against someone like Campbell. Is that your understanding?

A I believe that's correct, but I'd have to go back and look at that file to be sure.

Q Now, basically your practice, through your many years of practice, Mr. Nebeker, has been representing insurance companies and doing insurance kinds of work.

A Yes.

Q Would that be a fair statement?

A That's correct.

[156] Q You've never sued an insurance company for bad faith?

A I never have.

Q Now, in the trial of this case last year, you testified, "If I were to believe Summers' testimony about his concluding that Campbell was at risk, and so advising his supervisor, Mr. Brown and Mr. Noxon, and then was ordered

to change his report," you indicated you'd assume, for your opinions, that wasn't true. But if you assumed it was true, then your opinions would change.

A That's what I testified to, yes.

Q Now, you also testified that you assumed everything Mr. Bennett had said was true.

A Yes.

Q And anywhere that the Campbells' testimonies disagreed with Mr. Bennett, you assumed Bennett was telling the truth and the Campbells were not.

A I did.

Q And that's still your testimony.

A Yes.

Q Now, you were asked some questions about the last jury, and I'd like to clarify a couple of things. The last jury was not asked to decide the same issues as this jury; isn't that a fair statement?

[157] A It's my understanding that that's correct.

Q That some of the honesty issues that this jury will be asked to decide were not part of that trial.

A That's my understanding.

Q And because of that, that trial lasted, I think between two and three weeks. I think it started October 24th and went into the early part of November. Whereas this trial, heaven forbid, is now in its sixth week.

What that jury heard was largely limited to the facts of the underlying case, the evidence against Campbells and the accident facts, and what State Farm did or didn't do to settle the Logan case; is that a fair statement?

A Well, I already testified I didn't hear any of the testimony in the case. What you're telling me I think would be a correct representation.

Q And this jury has seen -- and I realize you haven't been here, either -- but it would be consistent with your understanding that this jury has seen a lot of evidence that that other jury didn't see.

A I assume that's correct.

Q And, in fact, you haven't seen most of the evidence that this jury has seen; wouldn't that be fair?

[158] A That's true.

Q You see all these black binders, here, of State Farm documents and president's forecasts and PP&Rs, and all of those things, you haven't seen any of that?

A I have not.

Q And Mr. Prater and Mr. Fye each had thirty or forty boxes of State Farm documents. You haven't gotten into any of those issues?

A I have not.

Q Now, Mr. Nebeker, I want to cover some areas with you that relate to your testimony on direct exam. For lawyers trying a case, it can be an interesting challenge for a lawyer to see if he can win a case or lose it, but for the people who are the parties to the case, it's really no fun to be in a lawsuit, is it?

A I don't think I would characterize it as fun.

Q And there are a lot of variables that take place at a trial, that you can't ever be sure just how it's going to go; isn't that true?

A That's true.

Q Trials are risky things, aren't they?

A They are.

Q And that was certainly true for Mr. Campbell in the Logan case, wasn't it?

[159] A Yes.

Q I'd like to discuss some of these things with you. This is a likeness of Mr. Campbell that I've had created.

A I don't recognize him.

Q I want to discuss with you -- And this is kind of corny, but it may help us as we go through. Some of the sources of risk for Mr. Campbell if, with a case being tried and not settled.

And first of all, you'd agree, would you not, that going into that trial there were some uncertainties as to just who would be on the jury and what the jurors would be like.

A Yes.

Q So that added some uncertainties to that trial?

A Yes.

Q And jurors typically aren't experts that have an idea of just how cases are decided. They're just people that are minding their own business, and one day they get a jury notice and next thing they know their summer's gone.

A They wished they'd never been home.

Q Another source of uncertainty in a trial would be the court, the judge has to make a lot of [160] rulings, and you can't predict just how those will go as the trial unfolds; is that a fair statement?

A You cannot.

Q And things don't always go as planned for the lawyers, either, do they?

A They don't.

Q Now, in this case, it shaped up pretty early that Mr. Slusher didn't seem to have any fault, and the case sort of became a contest, with Mr. Campbell's lawyer, Mr. Bennett, blaming it, the accident on Todd Ospital, and the Ospitals' attorney blaming the accident on Mr. Campbell. Is that a fair statement?

A I think that's a fair statement.

Q So the Ospitals were going to try to establish, both because they had a claim for death and because they were defending the accusations made against Todd, they were going to be trying to put blame on Mr. Campbell.

A They were.

Q Now, Mr. Slusher, in his deposition, testified that the accident was Campbell's fault. That was the first deposition taken in the case, probably, wasn't it?

A It seems to me that it was. I haven't checked the dates, but essentially he said it was [161] Mr. Campbell's fault.

Q Now, you mentioned that the officer claimed in the hospital that Slusher had said otherwise I think you said that was a change in his testimony. It actually wasn't testimony the officer was taking. It was the officer just talking to him in his hospital room?

A He was just talking to him, I think, with his parents there, as I recall.

Q And both he and his parents later denied that he made those comments.

A They both recanted that testimony, or that evidence.

Q There was no tape recording or no, nothing in writing. Simply the officer's memory.

A It was his memory as to what Mr. Slusher had said in the hospital.

Q Mr. Slusher's sworn testimony blamed Campbell.

A At the trial he testified differently.

Q No, I'm talking about his deposition.

A You're talking about changing his testimony from what he said in the hospital room? Yes, he did.

Q Well, from what the officer claims he said.

A Right.

[162] Q But his sworn testimony, both in his deposition and at trial, blamed Campbell.

A Yes.

Q Okay. Now, you would agree, would you not, that there was a lot of other adverse evidence against Mr. Campbell? That being Gerber, Chipman, Zucca, Pat Gerber?

A I would not characterize that as being adverse in the sense that it was all adverse. Because it was all conflicting evidence that I think, when you look at witnesses and their testimony conflicts with what other witnesses are saying, you have to evaluate that and determine how credible it is.

Q Well, eye witnesses rarely tell the exact same story, do they?

A No, they don't.

Q In fact, if you had an accident and five people saw it, and they all told the exact same story, that would be suspicious, wouldn't it?

A It probably would be. It would depend upon the nature of the accident, I think, how clear it was.

Q I don't know if the jury can stand me putting these up one more time. Let me see if I can shortcut this. I'm looking at Mr. Gerber's deposition summary. Didn't he testify that Mr. Campbell, in the gray car, [163] was going seventy to seventy-five miles an hour?

A I think he did put him over the speed limit.

Q And he said nothing that was unusual about the Ospital car, and it was traveling between fifty and sixty?

A I think that's what he testified to.

Q He also claimed that Campbell was still in the opposing lane when Ospital passed him.

A I believe he did.

Q You'd concede that's adverse testimony, wouldn't you?

A That would be adverse.

Q And his wife didn't see a lot, but she did recall her husband commenting when he saw Mr. Campbell, "Look at that crazy fool"?

A I believe that was her testimony.

* * *

[165] * * *

Q If two cars are coming at each other, and Mr. Campbell's in the opposing lane, and Mr. Ospital's car is going, we've got witnesses saying anywhere from fifty to eighty -- Actually no witness said eighty, right? That was the officer that said eighty.

A There was the officer, two officers who said [166] he was traveling over eighty miles per hour.

Q He's coming at eighty, Campbell's coming at seventy or seventy-five, and they are within a second of colliding before Campbell gets out of the way, you don't think that incriminates Mr. Campbell?

A Well, I think that you're talking about evidence that was conflicting, Mr. Christensen, because Mr. Campbell said that he was going about the speed limit, fifty-five, when he started to pass the truck and camper, and that when he got out to the side of the truck and camper he then had to accelerate to get around. But the estimate of seventy miles per hour, I think, was given by one of the van drivers. Mr. Campbell said he never was going that fast.

Q Well, Mr. Campbells's own expert, the one hired by Mr. Bennett, said it was eighty-two hundredths of a second, didn't he?

A Are you talking about Mr. Dahle?

Q Yes.

A I don't believe I ever saw evidence that he said eighty-two hundredths of a second. Are you talking about the time that he had to get back?

Q Yes, the time that passed after Campbell got back until Ospital --

A I didn't see that testimony.

[167] Q You are aware that Mr. Bennett met with Mr. Dahle and recorded the interview?

A Yes.

Q Do you see this statement, Mr. Bennett asked, "How many feet separates Ospital and Campbell when Campbell straightened out totally within his lane?"

Dahle said, "230 feet."

Bennett said, "How much time is that?"

And Bob Dahle said, "Not very much, eighty-two hundredths of a second."

A Yes, I think, as I recall that, they were talking about a lot of different scenarios as to how the accident might have happened, and I think typically lawyers do that when they're talking to their experts. And I think I'd need to read that entire recorded statement, but I think that, obviously that's one of the scenarios he came up with.

Q He also gave the opinion Campbell was at fault, privately, to Mr. Dahle, didn't he? Or to Mr. Bennett.

A I think he talked about different scenarios, and said he thought that Mr. Campbell could be found at fault.

Q I'm having a hard time reading my transparencies. I'm looking at trial page 3140. He [168] said, "I feel that I personally, you haven't asked for my opinion, but I think, yeah, Mr. Campbell did look, and it was clear, and he pulled out and he didn't look for three or four seconds, and when he did, here comes Ospital, and it's all over."

A Yes, and I think when you factor in the fact that Mr. Campbell, who pulled out to pass, when there's clear indication that he has time and space to do it, and gets out in the passing lane--and I think many of us have been there--and had somebody approaching at a very fast speed, you have to react to that. And I think Mr. Campbell did react to it. I think that the overriding issue, here, is the speed with which the Ospital vehicle was approaching Mr. Campbell.

* * *

[170] Q You're also aware, are you not, that Mr. Dahle told the representative from Allstate during this same time frame that, even assuming Ospital was going eighty, that his calculations are very specific, down to tenths of a second, and that they showed that Campbell did not allow sufficient time to safely execute a pass. Have you seen that letter before?

A I have seen that letter, yes.

* * *

[171] * * *

Q Well, you would agree with me, now that we've looked at this, that there was a lot of adverse evidence against Campbell that was out there, wouldn't you?

A I don't like the word "all adverse." I think it was conflicting. Because if you look at all the testimony of those different people, you'll see that they all had different versions of how the accident had happened. That's my sense of it.

[172] Q But you won't concede there was any adverse evidence against Campbell?

A There was adverse evidence against him, yes, there was.

Q Another factor that increased the risk in the case was, it was clear Slusher was going to win.

A Yes.

Q And Slusher had serious injuries, he was going to get a sizable verdict, wasn't he?

A He was. I think the medical specials were under $20,000. I think, in Mr. Humpherys' letter, he pointed out that Mr. Slusher, I think, was going back to college, that he injured his left arm, and that he was right handed, which probably, to some extent, would --

Q That was Mr. --

A That was Mr. Humpherys' letter to his company.

Q Okay. But the injuries were serious.

A They were serious.

Q And we've read two different lists to this jury of those injuries, and I won't read them again.

We also had a tragic death, didn't we?

A We had a death, yes.

Q Very outstanding young man?

A My review of the testimony of him was he was [173] a fine young man.

Q Another source of risk in a case like this is, nobody knows for sure what the jury award's going to be, do they?

A They don't.

Q That's one of the most anxious moments in a trial lawyer's life, isn't it?

A You're about to have a heart attack.

Q When the jury comes back and says they have a verdict?

A Yes.

Q And jurors aren't given, in death cases, they're not given amounts to, by the court, or guidelines, or books to look at. They just use their judgment and decide what's fair, don't they?

A Yes, and I think I've testified before, I wasn't sure if the judge had instructed the jury about parameters on this case or not. But I think now, typically the judges do not do that. They simply give instructions dealing with how the jury is to calculate damages, and the jury does it.

Q And that also would be true with Mr. Slusher's claims, that ultimately the amount is up to the jury.

A That's correct.

[174] Q And they don't have the benefit of years of experience and knowing what other juries may have done or what settlements have been, they just have to do their best and pick a figure.

A That's correct.

Q And a jury, if it so chose, would have awarded a million dollars for Mr. Ospital's death. It's not likely, but it could have happened.

A It could have happened. Not likely, as you say.

* * *

[183] * * *

Q We have. We are hard up for entertainment. If we were to have a roulette wheel, and your testimony is that Mr. Campbell had about a 20 percent chance of losing?

A I think I said 10 to 20 percent.

[184] Q Well, let's take twenty, let's assume there are ten numbers on our wheel, and we put Campbell's name on two of those. We spin the wheel, if it lands on either of the numbers with Campbell's name on it, Campbell gets a large excess verdict against him. If it lands on one of the other numbers, State Farm saves $50,000 and Campbell gets nothing. Do you think it's in his best interest to play?

A Well, I don't agree with your analogy, there, because I think that if you look at what kind of chances you had going into the trial, for the bulk of the negligence, even if you look at 80 percent of it being assigned to Ospital, then you have to factor what kind of a number might have come out from the jury. And I think there was still no reasonable likelihood that it would have exceeded his policy limits.

Q So the Logan jury was wrong.

A I'm not talking about who's right or wrong. I'm talking about your analogy, and I just don't think that applies here.

Q The jury last fall was wrong?

A I'm not talking about whether the jury was right or wrong, I'm still talking about looking at the evidence as they went into the case, starting in September of '83, that you would expect the jury up [185] there to find Mr. Ospital primarily at fault, and Mr. Campbell not at fault. Or, if he was at fault, it would be minimal.

Q You do agree that two juries have disagreed with what you've just said.

A I don't think the juries have disagreed with what I've just said. The juries have, in the Campbell case, the first trial, obviously they found that Mr. Campbell was 100 percent at fault. So that was a result that I would say was not expected. It was a very unusual result, resulting in a lot of factors that we've all talked about that kind of influence a trial. Part of it due to Mr. Humpherys' expertise as a trial lawyer.

Q Mr. --

A But I think the second jury was looking at the question of whether or not that they reasonably could have expected a verdict, and they disagreed with that. But I still think we're talking now about hindsight, which is a lot different than going into the case with just what you know about it at the time of the trial.

* * *

[188] * * *

Q Now, Mr. Nebeker, you've talked about some documents, given opinions about whether you thought that the Campbell, or excuse me, that the Ospitals or Mr. Slusher ever intended to execute on Campbell's property. I don't want to belabor that, but let me ask you a couple of questions. The agreement that you looked at did not keep Ospital or Slushers from [189] executing on Campbells' property. That option was still open if they chose to exercise it, wasn't it?

A It was still open to them, but I think the documents, the purport of them is that they did not intend to do that.

Q Okay.

A The option was there.

Q But the option was there.

MR. BELNAP: Are you talking about the June, '83 agreement?

MR. CHRISTENSEN: Yes.

Q (BY MR. CHRISTENSEN) Obviously the agreement in December of, what, '84 --

A Closed out that one.

Q Closed that down. But at that point they had agreed not to do it?

A That was my understanding.

Q Now, this jury has heard the Ospitals and Mr. Slusher both testifying about struggling with the decision whether to execute on Mr. Campbell's property, or to enter into an agreement that meant they had to be in more years of litigation with State Farm. And I will represent to you, and I will tell you this isn't exact, but generally speaking, Mr. Slusher talked about he needed the money. He didn't want to wait. And he [190] consulted with his parents. The Ospitals talked about times when they were pretty angry at the person they felt was responsible for their son's death, and they struggled with the decision.

You're not suggesting that none of that testimony this jury has heard has any validity, are you?

A No, I'm not.

Q You testified about supersedeas bonds. Why does an insurance company in an excess verdict situation -- Let's say you've got a policy limit of $50,000 and an excess verdict of 250, why is it -- and I'm not now talking about State Farm in Campbell, just in general -- why would an insurance company be hesitant to put up a bond, a supersedeas bond for this amount, if their policy limit was this amount?

A Well, if they put up a bond for that amount, if, in fact, the judgment's affirmed, then they have to make good on the bond.

Q They have to pay.

A That's right.

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EXCERPTS OF TRIAL TESTIMONY OF LELAND F. NORMAN, JULY 16 & 17, 1996

[Vol. 24, R. 10279, commencing at p. 210]

* * *

LELAND F. NORMAN called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCHULTZ:

Q Could you please state your name.

A My name's Leland F. Norman, and I go by Lee.

Q Mr. Norman, where do you live right now?

[211] A Franktown, Colorado.

Q And how long have you been a resident over there in Colorado?

A I've been a resident there since 1970 in Colorado.

Q Are you presently employed by State Farm Mutual Automobile Company?

A Yes, I am.

Q How long have you been employed with State Farm?

A It'll be twenty-six years this month.

Q So you started in 1970?

A Yes.

Q Where did you work before you came to work for State Farm?

A I was a school teacher before I came to work for State Farm.

Q Where were you a school teacher?

A Okay, I was in Los Alamos, New Mexico.

Q What kind of class did you teach down there?

A It was vocational education in auto body mechanics and auto mechanics.

Q Do you have an educational background in auto mechanics?

A Yes, I have a bachelor of arts degree from [212] Kearney State College, which is a subsidiary of the University of Nebraska, in Kearney, Nebraska.

Q And what is your bachelors degree in?

A It's in vocational education.

Q Have you got any background working in body shops?

A Yes, I was employed in a body shop for six years prior to going to college.

Q And what kind of work did you do in the body shop?

A I was a body man and a painter.

Q Where did you do that?

A In Imperial, Nebraska.

Q And in that position, did you have occasion to come in contact with State Farm?

A Yes, we did work for all insurance companies.

Q How was your relationship with State Farm as a body shop man?

A Very good.

Q Now, after you taught school, is that when you came to work for State Farm?

A Yes.

Q What is your present position at State Farm?

A I'm a claim specialist in our Highland service center in Littleton, Colorado in auto damage [213] claims.

Q What does a claim specialist do?

A We process and handle first and third-party claims in automobile damage.

Q And so you're dealing strictly with the property damage side of claims?

A Yes.

Q Have you had the experience of, Mr. Norman, of serving on storm duty?

A Yes.

Q Have you had the experience of being a supervisor on storm duty?

A Yes, I supervised three storms.

Q And when was that?

A 1980, 1981, 1984.

Q The storm that you supervised in 1981, where was that?

A It was in Pueblo, Colorado.

Q Okay. And do you recall, Mr. Norman, in your supervision of that storm, that you had several people come and help you from outside the Pueblo, Colorado area?

A Yes.

Q How many people worked for you on that storm duty?

[214] A I had two claim representatives, there was four appraisers, and three or four clerical staff.

Q Did you have some estimators?

A Yes, there was four of them.

Q And was Bruce Davis one of the estimators?

A Yes, he was.

Q Do you recall there were some people that came over from the state of Utah to assist on the storms, as well?

A Yes.

Q And can you remember any of their names?

A One of the gentlemen was Hap Johnson, the other one was Dennis James, they were both estimators, and Rosa Smith was one of the claim representatives.

Q Now, can you just explain briefly, when we talk about storm duty, you are bringing people in from outside the area to assist with claims; is that basically it?

A Yes.

Q And why is it that State Farm does that?

A It's to provide service to our policy holders, and to take the rush claim volume off of the local claims people.

Q Do the local claims people continue to work, as well?

[215] A They continue to work on their regular automobile accident-type claims. They're not involved with the storm operation at all.

Q Do you recall in the Pueblo storm, how you set up your storm office, and how that operated?

A Yes. You may need some background on that. Even prior to a storm, prior to the storm season -- In Colorado storm season usually runs from like April to September. The local claims people will have already done garage surveys, that type of thing, to establish prevailing competitive prices on the repairs, parts costs, that type of thing.

When we are called in to a storm, I reported within twenty-four hours after the storm occurred to set up the storm site, and get our people there, and get up and in operation.

Q What kind of a building were you working out of in Pueblo?

A In this particular storm we were working out of a medical office building, it was on a lower floor that was vacant in this particular building, and we were also using the parking lot to inspect vehicles.

Q Just explain briefly how one of these storm operations, then, works. You have some estimators, and you have some claim representatives, and what's the [216] procedure? People are coming --

A As soon as the storm supervisor gets on site, well, actually prior to that, the agents are going to be inundated with calls from their policy holders, and these are all first-party claims.

Q When you say the agents, who are you talking about?

A This is our agents that sell the policies to the policy holders.

Q And these are the agents that live in the Pueblo area you're talking about?

A Yes.

Q Okay. Go ahead.

A And their insureds are going to report the claims to them, and they're going to be naturally inundated with calls and damage to the vehicles.

Q By the way, what kind of a storm was the Pueblo storm duty?

A This particular storm ranged between 2,000 to 2,200 claims.

Q It was a hail storm?

A Yes.

Q Was there a tornado involved with it?

A No.

Q Were there two tornadoes?

[217] A There was no tornadoes to my knowledge.

Q So go ahead and explain the procedure.

A Okay, as the insureds are called in, the agents are instructed prior to the storm season that if a storm occurs, when their policy holders call in, the first thing they're supposed to tell them to do is if they have a vehicle that is with broken glass, broken windows, broken roofings, vents on motor homes, travel trailers, that kind of thing, to go ahead and expedite temporary repairs to secure that vehicle in case it would rain. Get them out of the weather, at least seal them up in some way, shape, or form.

Then they start scheduling appointments. The agents in that particular storm were set up to take the appointment schedules and start setting the appointments for the storm crew when they come in.

Q And how would -- Is the storm duty office, when it gets up and operational, is it a very calm and peaceful area, or how would you describe it?

A Well, organized chaos. That might be the best way to describe it. It's a very busy operation, we're scheduling

appointments through about every twenty minutes. We're set up for high volume. There's people milling around everywhere in a storm situation like that, because of the volume of people that are coming [218] in.

And you set up the office structure so the customer can report in. At that point they're assigned an appraiser, the appraiser goes out and looks at their vehicle, or estimator, whichever you want to call it. They go out and look at the vehicle, explain the insured's options to them on the repair, appearance allowance, or cash out, whichever they want to do. And then they are brought in to a claim representative who does the final processing on the file and issues payment if we're going to make payment at that time.

Q Now, you said you were the supervisor over this operation in Pueblo, correct?

A Yes, sir.

Q So were you the one that was basically responsible to see that the operation was handled appropriately?

A Yes. My primary purpose is to keep the storm office operating, and rolling along on a time schedule, and also reporting the dollar amounts we're spending to our regional office so they can set necessary reserves, get the necessary people there if we would happen to need more.

There's some storm operations you start out maybe only thinking you're going to have a certain [219] number of claims and then you realize that you're going to have more. If so, you need more people.

Q Let me ask you about that, just another thing. You said you keep track of how much you are paying?

A Right.

Q And that is transmitted to the regional office?

A Yes, on a daily basis.

Q And the reason for that is what?

A It's to set reserves so we have the money in the accounts to pay the bills, and to process the claims.

Q Is it also a way of knowing how many people you're going to need on storm duty, as the time goes by?

A Sure. If you're getting a volume reported, let's say, for instance, in this particular storm most of the damage was running right around $2,000 in damage. If you've got a consistent basis of that kind of damage coming through, and you're filling your appointment schedules every day, and you can handle those numbers, then you probably got an adequate number of people.

If the numbers start to diminish, then you may have a need for not as many people, so you'd start scheduling days down the road on how many appointments [220] are going to be necessary, how many estimators you're going to need, how many claim representatives you're going to need. The whole purpose is to serve that customer.

Q Mr. Davis has testified that at the Pueblo storm duty, Mr. Norman, there was a contest to see who could get the most appearance allowance settlements, and that there was a record kept of how much money was saved by negotiating appearance allowances on property damage claims. Was that done?

A No, that's not correct. No contests were run. Number one, you don't have time to play games. The volume is set to where you are so busy that you're not going to be keeping that kind of records for contests. The only records that were kept is the indemnity payments, so we could establish how much money we're going to need for the storm and how many people we're going to need.

Q Well, Mr. Davis said that he saved the company $110,000 in ten days, and as a result, at a banquet that was held later on, he was given a State Farm beach blanket.

Now was there a banquet held sometime during that year?

A There was a recognition banquet given at the [221] end of storm season, at which time every person that worked storm

duty was recognized and given a beach blanket or beach towel.

Q Did you get a beach blanket?

A Yeah, I got one. Everybody that worked on that storm got one.

Q Now, did some -- Did the recognition depend upon how long the people stayed on the storm?

A Yes. There was additional gifts, if you will, say, given to employees that put in the most number of storm days. And you know, that's the only other criteria that would be there. It's an appreciation banquet, it's not a contest banquet or anything like that.

Q How long did you stay on the Pueblo storm?

A I was in Pueblo approximately three weeks.

Q So you were there about twice as long as Mr. Davis?

A I was there before Mr. Davis got there, and I was there after he left.

Q Now, you mentioned that there was, the Pueblo storm was a -- I'm not going to throw this at you. The Pueblo storm was a hail storm.

A Yes.

Q Mr. Davis has testified that the hail stones [222] were as big as grapefruits.

A That's not correct.

Q What information did you have about the size of the hail stones?

A From reports from our agents and the U.S. Weather Service, there was hail stones in that vicinity on the average size between a ping-pong ball and maybe a golf ball. There was a remote area in the Northridge area of Pueblo that had some isolated hail that was as big as tennis balls.

Q Now, have you had enough experience with hail storms, Mr. Norman, to explain what kind of damage would be done to, let's say, a motor home that was caught in a hail storm with grapefruit-sized hail stones?

A I personally have never seen a hail stone as big as a grapefruit. I have seen some softball sized hail stones and baseball sized hail stones, and they'll literally destroy the top of a motor home.

Q If a motor home had been involved in a hail storm, been hit by hail stones the size of grapefruits, based on your experience, would that be the kind of damage that you would recommend someone to take an appearance allowance on?

A There wouldn't be anything left to take an appearance allowance of. The grapefruit-sized stone, [223] like I say, would destroy that vehicle.

Q And Mr. Davis also said there were two tornadoes involved in that Pueblo storm. You indicated there were no tornadoes?

A Right, there was no reports of any tornadoes that I know of.

Q He also gave us an example in his testimony, Mr. Norman, of how appearance allowances were used in a deceptive way to try and pay less than policy holders were fairly owed, to not tell them what an appearance allowance was, to not tell them what their real policy rights or benefits were.

A That's not correct.

Q What was the approach taken at this storm, as far as appearance allowances or any other repairs?

A There's three criteria that an appraiser is supposed to approach a policy holder with when he looks at their vehicle. Number one, if it has major damage he's not even going to mention appearance allowance, because it's going to have to be repaired. If it's very minor damage, and it's cosmetic damage only, and this may be on a partial section of the unit if it's a motor home that has damage to the roof hatches and that have to be repaired, they will be.

But if you have skin damage to a front or [224] side or back that's very minor, then that option is given to the policy holder that they can take an appearance allowance for that damage and not have it repaired, and that that appearance allowance will not be held against them on future claims.

Whereas if the other options, if they write an estimate, then the policy holder has two options available. If they elect to repair the vehicle, we don't even issue payment at that time. They go ahead and go to the body shop or RV center, have the vehicle repaired, and we pay it on final bill.

If they elect a cash settlement, which is another option available to them, and it's based on our estimate of repair, then that is held against them on future losses as prior damage, and our underwriting department is notified of that prior damage.

Also, if there's a lien holder involved on that unit, and in this particular storm if it was damage over $500, we were required to list the lien holder on that payment, as well, because they have an interest in that vehicle, and usually would require it to be repaired.

Q Now, were these options explained to the policy holders on the Pueblo storm?

A The estimators and claim reps were both [225] instructed to address those options with the policy holder, and if they didn't do that they weren't doing their job.

Q After the estimator did the initial estimate, where would the policy holder then go, as far as finalizing the claim?

A He would, the policy holder would be taken to our claim representative, who would, again, go over the estimate, explain their options to them, and either release the estimate if it was a repair, or issue the cash settlement.

If the agreement had already been arrived at to do the appearance allowance by the estimator, they did not even complete an estimate at that point. They just wrote appearance

on the estimate, appearance allowance on the estimate sheet, and came to an agreement with that policy holder on the dollar amount of that appearance allowance.

Q Now, was the claim representative also instructed to go over that with the policy holder and explain that, again?

A Yes.

Q Would any of these appearance allowances be taken without the explanation of the option, and the agreement of the policy holder?

[226] A No, there's no way you could.

Q What if a policy holder took an appearance allowance and then later decided they'd rather have the vehicle repaired? Could they do that?

A They could do that. At that point we'd write an estimate and put the vehicle under repair, or do the cash settlement, if that's what they wanted to do.

Q Now, when you went in for storm duty in Pueblo, was any kind of information disseminated so that State Farm policy holders would know that there was a storm unit there to help them?

A As soon as a storm hits, our publications department arrives on site and they file ads in the newspapers, they advertise ads on radio, on television, soliciting our policy holders to come in.

Q Now, is it your understanding that the reason you do that is so that you can then take unfair advantage of the policy holders?

A No. It would not be to our advantage to deceive the policy holder. Number one, the agents wouldn't put up with it because that's their livelihood, is those policy premiums, and policy retention is one of the main reasons for us to be there.

Q An example was testified to by Mr. Davis in his testimony regarding how an appearance allowance [227] might be used on a motor home, Mr. Norman. And the example that he used was a situation where the actual repair cost on the motor home would be $3,000, and that the attempt would then be made to settle that with an appearance allowance for $500. Based on your experience, does that sound like something that would typically happen?

A Number one, if they were going to take an appearance allowance we wouldn't write an estimate, so I don't know how he could arrive at the $3,000 figure and then come back to the $500 or whatever, on the appearance allowance.

An estimate was not written on an appearance allowance. That was an arbitrary number arrived at between the customer and the appraiser without writing an estimate.

Q Now, there's been some testimony, here, Mr. Norman, that appearance allowances could never exceed 50 percent of the repair cost.

A That's the general rule. You try to approximate, approximately 50 percent of the material cost, and that's what you would offer as an appearance allowance.

Q And would the people who were dealing with potential appearance allowances be trained sufficiently [228] that they could give an accurate proposal or estimate of what the approximate damage or repair cost would be?

A Sure, they could. With the volume that you're running through there, you're writing estimates on the majority of the vehicles. There's not that many appearance allowances you'd make. So within a few days you would have a pretty accurate guess of what the, you know, average repair was going to run.

Q Let me just ask you this question again. Just in the sense of the amount involved, a $3,000 repair, is that a minor repair?

A No. No. You probably wouldn't offer an appearance allowance on one with that much damage.

Q One of the other things that Mr. Davis has talked about in general is that he was taught and instructed, and it was basically drummed into him, that if, that he was supposed to look at the people as they came in to settle their claims, and from looking at them, he was to decide whether or not he could take advantage of them based on what their socioeconomic status was, rich, poor, single, widowed, retired, things like that. Is that the kind of instruction that you were giving to him in Pueblo?

A No. No, there has never been any type of instruction to take advantage of anyone. Number one, [229] you can't tell what somebody is when they walk in the door.

Q He also talked about an older couple that might come in with their motor home, and if they had a trout decal or something like that on it, that was a tipoff that that person wouldn't want to get a repair, and he could essentially treat them unfairly, and not pay what they were due. Is that something that was instructed?

A No. No, I've never -- That was the first time I'd ever heard of that, when I first heard of that testimony.

Q Have you, during your twenty-six years with State Farm, been taught to take advantage, or cheat claimants or policy holders because of their station in life?

A No.

Q Have you ever done that yourself?

A Not that I'm aware of.

Q Do you think you've ever made a mistake in all those years?

A Oh, I'm sure there's been some errors made, as far as mathematical errors or something like that. And if that is the case and it's brought to our attention, we will go ahead and take care of it.

[230] Q Is there any reason why State Farm would not want to cheat people on a storm duty?

A Well, number one, if we was being deceptive to the public on a storm like that, number one, the agents would run you out of town, because that's their livelihood. These are first-party insureds.

MR. CHRISTENSEN: Objection, repetitious.

Q (BY MR. SCHULTZ) Any other reason?

A Policy retention. We want that customer satisfied. We want them to stay with us.

Q Now, in your experience as a State Farm claim specialist, claim representative, Mr. Norman, have you become familiar with the use of recycled parts in repairs?

A Oh, yes.

Q Did you use those when you worked in a body shop?

A Yes, we did.

Q Was it a standard practice in the industry?

A Standard practice within the industry.

Q Do you still use those when appropriate?

A Yes, we do. There's advantages to using quality replacement parts and salvage parts.

Q What's an advantage to using those parts?

A A good example would be like if you had [231] damage to a door on an automobile that was severe enough to where the door required replacement, if you buy a new door from the factory, you get a bare shell, you get no factory weather strip, no factory sound deadening materials. You get no hardware, no windows, no glass, no regulators, no hinges, no moldings.

You buy a used door assembly, you get a factory-built, complete door, with all the hardware and equipment that goes with that door. And you can usually purchase that used door for about half of what just the shell on a new door costs. Then you have to add all those other accessories to that new part. So there's considerable savings that can be made, there, and you get a factory built part to put on that particular car.

Q And is there any benefit to the policy holder --

A Definitely.

Q -- receiving that?

A Yes. Because the factory sound deadening materials are very hard to duplicate in the field. And most people will know when they buy a brand new car, when they shut the door it has a thud sound. It's real tight and that type of thing. It's hard to duplicate that when you start out with a bare steel shell, you cannot get that factory sound back in that door.

[232] Q Have you ever felt like you were cheating a policy holder if you put on that kind of a replacement part door, as opposed to buying a brand new one?

A No, it's like kind and quality to the part that they had on their vehicle to begin with, and that's what our policy says we will do.

Q Now, are you familiar with the concept of after-market parts?

A Yes, I am.

Q Mr. Davis testified that there was a display, or displays in the claim repair service centers over in the Colorado, the Denver, Colorado area, showing original equipment manufactured parts, and after-market parts, and there was like a question that said, "Can you tell the difference?" Do you recall that?

A Yes, there was such displays.

Q And Mr. Davis has testified that after a while the after-market parts, or part, or parts, started to rust out, and they had to be taken down. Now, in your experience, did that happen?

A No, we had those displays in five service centers in that Denver metropolitan area, and they were all indoors. They were not subject to the elements, so I don't even know how they could have got into the elements to become rusty. I never noticed any rust on [233] any of the panels that I saw.

Q Has your ability to maint[illegible] your job, or to get a raise, been dependent upon you paying less than what was fairly owed on claims?

A No.

Q In your work have you been required to become familiar with the concept of comparative negligence on third-party auto claims?

A Colorado is a comparative negligence state, and we have to apply comparative negligence whenever evaluating third-party claims.

Q Mr. Davis has suggested in his testimony that he was required to assert comparative negligence when it really shouldn't have been asserted, and it was used in a deceptive and unfair way. Is that the way you've been taught to handle that?

A No. No.

Q Is comparative negligence the law?

A It is in the state of Colorado, yes.

Q Have you been involved in the handling of rental claims, Mr. Norman?

A Yes, I have.

Q And what has been your practice insofar as informing policy holders of their rental coverages?

A If a policy holder has rental coverage on the [234] vehicle, we do solicit that coverage.

Q Do you explain it to them?

A Yes.

Q Have you ever been instructed to withhold that information as a matter of practice and policy at State Farm?

A No.

Q Have you had --

MR. SCHULTZ: Your Honor, I'm getting close, but I know we won't get done with cross examination.

THE COURT: How close are you? It would be better to finish direct if you're within striking distance.

MR. SCHULTZ: Shall I go for another five minutes and see if I'm done?

THE COURT: Let's give that a shot.

MR. SCHULTZ: Okay.

Q (BY MR. SCHULTZ) Mr. Norman, have you had experience in handling total losses?

A Yes.

Q And for purposes of my question, I'm just going to represent to you, and you tell me if I'm wrong, is a total loss a situation where the cost of repairing the car is either so close to its actual value, or exceeds its actual value, that it's, basically it's not [235] worth it to repair?

A That's correct.

Q Mr. Davis has testified that he was essentially instructed to never pay any -- Or let me rephrase that. To pay less than actual cash value on total losses, and to take advantage of people he referred to as the weakest in the herd.

A No.

Q At least that's the concept he put across.

A No.

Q What's been your experience in that regard?

A Your settlement has to be based on the actual cash value of that vehicle on the market, because the customer has to go out and replace that car. If they can't replace the car, then your settlement's not adequate.

Q How do you determine actual cash value?

A There's several different ways you could do that. In most cases, we did a market survey where you would actually locate vehicles through dealers and the local newspapers, get the information from those vehicles, and compare that with the vehicle that was damaged, and make adjustments to fit that particular vehicle that was damaged so you could come up with a realistic actual cash value.

[236] Q Now, Mr. Davis has also testified that State Farm taught him, and that he did this, to make total loss settlement offers on a Friday afternoon, and to put pressure on the insured, or the claimant, that they had to take that on Friday afternoon, or their rental car would be yanked out from underneath them over the weekend. Now, what is State Farm's policy in that regard?

A Our policy has always been that we would allow rental five days beyond the offer of settlement, and that's five working days. That allows that customer to have an adequate time to find another vehicle.

Q So if you made a total loss settlement offer on a Friday afternoon, the customer would have until the next Friday?

A That's correct.

Q And have you sometimes even given them more than five business days?

A With extenuating circumstances I have. For example, if you have a customer with a title problem that they've got to get squared away or something like that, and you weren't aware of it until they actually came in to settle, maybe they had to go get a duplicate title because there was an error on the title or something like that, you would extend that rental to [237] benefit that customer.

Q Have you had any experience where policy holders or claimants have come in, and your review of the vehicle would indicate that it was clearly a total loss, but that they did not want it to be totalled out?

A There's many times you'll find out on an older car, a car that's ten, fifteen years old, that really the cosmetic damage is not, you know, a safety hazard to the vehicle, it's still operational, it's a back and forth to work type car, and some of those people, they can't afford to let go of the car and they don't want to. They don't want to make car payments.

Q Have you been willing to work with them on those situations?

A You bet. Many times you'll adjust the settlement to where they retain that car and go on about their lives, and they live with some damage. At least they've got enough money to get some temporary repairs made for headlights and that type of thing, and continue to use the car.

Q Did you ever use buck slips?

A That's a tool that one would use when receiving a phone call and taking a message, and maybe you didn't have the claim file with you, or it was somewhere else in the office. You'd write it down on a [238] buck slip, go find the file, and then transfer that to your activity log in the file and throw away the buck slip.

Q Did you use buck slips to write information that was negative about State Farm so it wouldn't be in the file if it was asked for production in a lawsuit?

A No.

Q Did you remove information from files, Mr. Norman, if you thought it was, it might be detrimental to State Farm?

A No, your activity logs are chronologically dated, and there's no reason to remove anything out of that file.

Q Was there a time a couple of years ago where you were told that you were to clean out all your old materials out of your desk?

A Anything that was outdated, we were instructed to go ahead and throw away because it was not used any more, we needed the room in our desks for more things.

Q Were you told to do that so it couldn't be discovered in bad faith lawsuits?

A No.

Q Did you have very much stuff to throw away yourself?

[239] A No, I don't keep stuff.

Q In your view, is it dishonest to keep track of claims, or to be aware, I should say, of costs in normal claim handling procedures?

A It's not dishonest to be aware of costs. That's part of the day-to-day business of processing claims.

Q Have you ever knowingly or intentionally tried to cheat a claimant or a policy holder out of what they were owed?

A No, sir. If anything, I'd give the customer the benefit of the doubt and pay them more if I need to.

* * *

[Vol. 25, R. 10280, commencing at p. 4]

* * *

LELAND F. NORMAN the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION BY MR. CHRISTENSEN:

* * *

Mr. Norman, you're still employed at State Farm?

A Yes, sir.

Q You've been there for twenty-six years?

A Yes, sir.

Q And it's your sworn testimony -- By the way, [5] I took your deposition Sunday, as well; isn't that true?

A Yes, that's true.

Q Was your sworn testimony that in twenty-six years you've never treated anyone unfairly; isn't that true?

A Not that I'm aware of. I always try to be fair with a customer.

Q And in your deposition you didn't even qualify it. You just said you hadn't done it, right?

A I may have made that statement, but you know, I'm human.

Q In twenty-six years you've never tried to take advantage of anyone to pay less than fair value.

A No, I haven't.

Q You've never seen anybody do it?

A Not that I'm aware of.

Q You've never even heard of it at State Farm?

A That's not a practice that we would be involved in.

Q And you've never actually paid less than full, fair value.

A Not that I'm aware of.

Q You're not aware of anyone else doing it?

A No, I'm not, sir.

Q In fact, you claim that in twenty-six years [6] you're not aware of State Farm doing anything unfair to anyone; isn't that true?

A State Farm would never intentionally do anything unfair to anyone that I know of.

Q Well, you said you weren't aware of them doing it at all, intentional or not, didn't you?

A Well, I don't keep records of that type of thing, sir. I just don't treat people unfairly.

Q Now, you testified under oath that there was no encouragement at State Farm, ever, to pay less than book value on total settlements, didn't you?

A I didn't say that, no.

Q Well, let's get your deposition out.

A Okay.

Q You got it, there?

A No, I don't.

Q Maybe you can -- Can you turn to page 16?

A Okay.

Q Line 15. Do you see that?

A That says any encouragement to pay less than NADA

book. And there's no encouragement to do that. We base our evaluation surveys, not necessarily book value. Book value is simply a guide that we go by.

Q Let me read the question I asked you. "Any encouragement to pay less than NADA book value?" And [7] your answer was what, sir?

A It was no, and there's a reason for that.

Q It was no, wasn't it?

A NADA book is a guide that was used. It's not the determination of actual cash value. Actual cash value is determined by market survey.

Q All right, I'm going to try one more time. I asked you the question on line 15. "Any encouragement to pay less than NADA book value?" Would you read your answer, please?

A And my answer was no, and that's correct. Because of --

Q And your answer was what, please, sir?

A It was no.

Q Thank you. It was no, wasn't it?

MR. BELNAP: He's entitled to answer the question.

MR. CHRISTENSEN: The question was, what was your answer?

MR. BELNAP: And he said that, but if he needs to give an explanation, he should be entitled to give that, Your Honor.

MR. CHRISTENSEN: He's given it three times.

THE COURT: Well, let's proceed.

Q (BY MR. CHRISTENSEN) So your answer was no, [8] wasn't it, sir?

A Qualified no, yes.

Q You show me where the qualification is on this answer. Isn't that "No," and then there's a period after "No"?

A That's correct. But you never asked me anything further. You just asked me if we used NADA book, and I said no. Because we don't use NADA book as a settlement guide. It's simply a reference guide.

Q You're sure of that?

A That's correct.

Q This is a State Farm national book from 1979. You've seen this, haven't you?

A That's correct. I'm not sure I've seen that particular document, but, you know, I've seen other ones.

Q That's the PP&R program.

A Okay.

Q You were part of that?

A Yes.

Q Do you see this suggested goal right here, "Settle X-percent of all total losses at or below the current NADA book"?

A I have never seen that document with that page, sir.

[9] Q And State Farm has never used NADA book, have they?

A I have never used it as a, quote, settlement tool to actually develop the value of the vehicle.

Q Never?

A That's -- Only if I can't do a market survey, then I would refer to NADA book as a guide.

Q So you do use it.

A If you apply all the proper applications of that book, you can arrive at the actual cash value, and you can make appropriate adjustments to properly evaluate that vehicle.

Q By the way, you would concede, would you not, that this is terribly inappropriate as a goal, wouldn't you?

A I would not say that, no.

Q When the year begins, before you've seen one car, or before the accidents have even happened, someone's going to be setting a goal to pay below book value for the cars?

A There again, sir, I have not seen that page, and I have never been instructed to settle below NADA book.

Q And you've never heard of that happening, have you?

[10] A That's the first time I've ever seen that document.

Q It certainly didn't happen in your unit.

A From all the claims I've handled through the years, I have never went and made a settlement based on NADA book alone.

Q I thought you just said you did sometimes.

A In some occasions, where you cannot find a like vehicle, you use the NADA book as a guide. And if you appropriately use that book -- Because there's more than just the average value of that car in that book. There's tables in that book for options to that vehicle, mileage on that vehicle, to where you can develop a value range, that you can settle that claim within what is appropriate with the customer. But it's still a negotiated settlement with the customer. It's not necessarily driven from the NADA book.

Q Do you know who David Peterson is?

A Yes, I do.

Q He was your boss, wasn't he?

A For a period of time, yes.

Q We don't have your PP&Rs from the time frame that Bruce Davis worked at State Farm, do we?

A No.

Q In fact, we've only got yours for periods in [11] the nineties; isn't that true?

A I believe so.

Q And you're here to testify that Bruce Davis wasn't telling the truth. Don't you understand that's your function?

A Not necessarily to say that he wasn't telling the truth. It's just that he may have exaggerated on some things.

Q So what we've got, as far as documents from when Bruce Davis worked there, we've got his PP&Rs, the documents he gave us, and we've got Mr. Peterson's PP&Rs, and that's it as far as I know. Have you seen anything else from this time frame?

A No, sir.

Q Well then let's look at Mr. Peterson's. Like I say, he was your boss. He'd have had some influence on you, wouldn't he?

A Indirectly. He was a superintendent. My boss was a supervisor below him.

Q So he was your boss' boss?

A Correct.

Q Look at his goals. "Keep careful watch of total loss settlements. Strive to reduce at or above book settlements by 10 percent. Report my findings at unit meetings." Are those meetings you'd go to?

[12] A No, management would go to the unit meetings, and then we may have a unit meeting after that.

Q "So the personnel --" Doesn't "the personnel" sound like the people under this man?

A I would assume.

Q Including you?

A Correct.

Q " -- are aware of their production, and submit monthly report to divisional claim superintendent."

Now, let's look at how he did. On this side, his boss writes down how he did; isn't that true?

A I assume that's what that is.

Q Look down here. "As of October, 1981, settlements below book." Isn't that what that says?

A That's what that says.

Q Unit 160, that was the unit Bruce Davis was in, wasn't it?

A I'm not sure what unit he was in at that time. That could have been.

Q Look at this. 72.7 percent of total settlements settled below book value. Isn't that what that says?

A It doesn't say how it was arrived at, though, sir.

Q No, and we're going to talk about that.

[13] A Okay.

Q We're going to talk about the methods you used to achieve this. The year before, in August of 1980, 66 percent of people whose cars were totalled were getting below book value. And that wasn't enough, was it? State Farm wanted more; isn't that the way that document reads?

A Not necessarily. That's just a statistical average, is what it's shown there. It doesn't say they wanted more or less.

Q Doesn't that say, "Strive to reduce at or above book settlements by 10 percent"? Doesn't that mean they want him to pay less?

A It says, "Strive to reduce." It doesn't mandate that you reduce it by 10 percent.

Q He did it, though, didn't he? In fact, he did better than that. He took it from 66 percent to 73 percent.

A There, again, the factors of how that was arrived at is not shown there.

Q Now, I'll give you an opportunity -- You want to change your sworn testimony that State Farm never encouraged the payment of less than book value?

A I have never been encouraged to pay less than book value.

[14] Q Even by this man who was your boss.

A That's a unit goal that may have been established, but it doesn't mean you use strictly NADA book to arrive at that. It's good claim handling practice to properly evaluate the vehicles that you're settling.

Q And it's your sworn testimony that this was achieved in the unit you worked in by being fair, in fact, even generous with everybody; isn't that your testimony?

A Yes, and we were fair and generous with everybody, because it was based on actual cash value of the vehicle, not some projected book value.

Q And so State Farm just happened to insure people that all drove beat-up cars that were worth less than book; isn't that true?

A That's not true.

Q Is that a requirement, when someone goes to buy State Farm insurance in this area of Colorado, "We'll only insure you if your car's beat up and not worth much"?

A No, we have a lot of policy holders that drive Cadillacs and Lexuses, and very expensive automobiles.

Q And 73 percent of the people that came to [15] your unit with their cars totalled got less than book, didn't they?

A I'm not -- Evidently that statistic shows that, but it doesn't say how that was arrived at, and book value is not actual cash value.

Q You keep saying that. State Farm thinks it is, don't they?

A No, they don't.

Q That's what that book is written to try to show, isn't it?

A No, not necessarily. That's a guide.

Q If State Farm doesn't think NADA book means anything, why is this in their national handbook?

A I have no idea, sir. I didn't write the handbook.

Q Now, let's talk about some of the methods that were used to pay people, three-fourths of the people less than book. You were called upon to train other people, younger people, weren't you?

A Yes, sir.

Q You knew all the tricks of the trade, didn't you?

A I don't know what you mean by "tricks of the trade," sir.

Q You haven't learned a lot of things over the [16] years on how to get people to take less for their cars?

A I don't use deceptive measures, sir. I do an honest, factual evaluation of a vehicle, based on the vehicle that is involved in the loss.

Q You just tell people, "I'm not going to pay you book value," straight up. Is that what you're saying?

A No, I don't tell them that at all.

Q Isn't it true that you were known at State Farm for the old Friday-afternoon-pull-the-rental trick?

A No.

Q You would make somebody an offer of less than book on Friday, then you'd pull the rental car.

A That is not our practice. We're instructed to extend rental five days beyond settlement, our offer of settlement, and that's five working days, sir. It doesn't even include the weekend.

Q I'm going to show you your PP&R from 1990. By the way, if we had your PP&R from this time frame, it would read a whole lot like this, wouldn't it?

A I have no idea what it would read like, and it may or may not.

Q Let me show you the date on this. It's 10, it's October 29th, 1990. That's your name on this, isn't it?

[17] A Yes, sir.

Q Do you see the part I've underlined? "On total losses, once offer is made and claimant or insured is advised, rental to be terminated." That was a goal you had, wasn't it?

A Yes, but there was instructions to extend that rental five days beyond the offer of settlement, and that's five working days. There were some times we extended even beyond that, depending on extenuating circumstances.

Q I don't see "five days" up there, do you?

A That wasn't a goal at that time, because that was something we did on an ongoing basis.

Q Is that in writing somewhere?

A I have no idea, sir.

Q I don't either. Even assume, for a moment, you gave them five days. The pressure is still there once the rental car is cut off, isn't it?

A Not necessarily. Five working days should be a normal length of time for someone to go out and replace another vehicle.

Q Let's assume somebody's car is worth twelve, and you offer them ten.

A Twelve or ten what?

Q And you offer them $10,000 for a car that's [18] worth twelve.

A I wouldn't offer a person $10,000 for a car that's worth twelve.

Q I'm sure you never would, but just humor me for a minute. Let's assume that, okay? At the end of the five days, you take away their rental car -- And by the way, this says, not, "From when an agreement is made," but, "When an offer is made," right?

A That's a general statement. It doesn't put a time frame on it.

Q Once you make an offer, you jerk the rental. Now, Mr. Davis said you jerked it the same day, you say it's five days.

A Mr. Davis is evidently not telling the truth. Because the instructions I have been given is five days beyond the offer of settlement, and in extenuating circumstances we can go beyond that. It's a judgment call on the part of the adjuster.

Q But once you make this offer, even if it's five days later that the rental is gone, you've got the same leverage, don't you?

A Not necessarily. If the customer contacts me and advises me that he has not been able to replace that car, and needs some assistance in that process, it's my option to extend that rental longer if we need to.

[19] Q State Farm works very hard to pay less than book, don't they?

A I wouldn't say we work very hard to pay less than book. We want to pay the fair market value of that vehicle.

Q Another device you use to pay less than book is the old comparative negligence game, isn't it?

A Comparative negligence, in the state of Colorado on third-party claimants, is a statutory law that we have to follow.

Q You don't have to claim comparative negligence where the facts don't support it, do you?

A Every accident could have comparative negligence involved, sir.

Q You could argue in every accident it's involved, can't you?

A That's true. And not every case do we take comparative negligence.

Q Have you ever heard of the sudden storm defense?

A No, there's not a sudden storm defense.

Q I haven't heard of it, either. Does it surprise you to know we saw it in a State Farm file last Friday?

A I have no idea what you saw, sir.

[20] Q That could be one way to claim comparative negligence, is to say something like, "Well, we had a sudden storm."

A I have no idea what you're getting at.

Q You can use comparative negligence to say to somebody, "Well, I can't pay you full value for your car, because you're partially at fault."

A Only on third-party claimants. First-party claims, comparative negligence is not a factor.

Q But on third-party claimants you can do that.

A If there is comparative negligence to be applied, it would be applied.

Q And you're the one that gets to decide whether you're going to apply it, right?

A It's part of our liability investigation, we would determine if comparative negligence was involved, yes.

Q All right. Let's assume you've got a situation where, again, the car's worth twelve -- Let's make the math simple. Let's say the car's worth ten. And you say, "You're comparatively at fault, I'm going to deduct 20 percent. I'll give you eight." You do that a lot, don't you?

A Not a lot, but if it's appropriate and liability investigation depicts that there was [21] comparative negligence, yes, we would apply it.

Q State Farm is notorious for abusing comparative negligence, aren't they?

A No, they're not.

Q And if someone -- If you say to someone, "Your car's worth ten," you wouldn't say it's worth ten, you simply say, "I'll give you eight because of comparative negligence." Practically speaking, they can't afford to fight you for $2,000, can they?

A Sir, number one, I don't just give them an arbitrary figure. When I settle a total loss with an individual, I go over that vehicle and advise them how I've arrived at the evaluation on that vehicle. And if I'm doing a market survey that's based on replacement vehicles on the market, they have an option to go buy that vehicle if they so desire. Any negotiations for comparative negligence after that evaluation has been determined is explained to them also, based on Colorado law. It has nothing to do with arbitrary figures.

Q Let's look at your quarterly update of your PP&R from 1992. On goal. "Lee continues to apply comparative fault more frequently than other claims representatives as noted in the recent file review by management."

You're being complimented for this, aren't [22] you?

A That's because I do thorough investigations, sir.

Q And you use comparative negligence a lot to reduce what you pay people.

A When it's applicable, I apply comparative negligence based on the laws of the state of Colorado.

Q Now, in your deposition you said that using comparative negligence was not emphasized at State Farm to save money. Is that still your testimony?

A It's not a money-saving factor, sir. It's an application of the law in the state of Colorado. And if there's comparative negligence involved in the accident, we have a duty, by law, to apply that.

Q Sir, I keep hearing the same thing from you. Has someone told you to keep saying this?

A No, sir.

Q The law of the state of Colorado, I assume, is a lot like Utah. It doesn't mandate that an insurance company take comparative negligence.

A I don't know what the law is in Utah.

Q Well, Colorado certainly doesn't mandate that State Farm claim comparative negligence, does it?

A The law -- The statute says whenever there is comparative negligence in an accident, we must apply [23] that comparative negligence.

Q You also said there were no goals at State Farm around the use of comparative negligence, didn't you?

A As far as cost savings goals, no.

Q Any goals.

A We have to apply the law, that's our job.

Q Didn't you say there were no goals around comparative negligence?

A There's no goals that I have been approached with.

Q You were asked, and I'm looking at page 13 in your deposition, line 14. "You're not aware of any goals around contributory negligence." It says "to comparative," I think it should read "or comparative." Your answer was no, right?

A What line was that, again, sir?

Q I asked you, on line 14 and 15, "You're not aware of any goals around contributory negligence -- "

A What page, sir?

Q Thirteen. All right, line 14, "You're not aware of any goals around contributory negligence or comparative?"

And your answer was, "No," with a period after the "no," wasn't it?

[24] A Yes, and there's questions after that, that you asked me, that explains that question.

Q I want to read the next question. "Would you agree that would be wrong?"

And your answer was, "Yes," with a period at the end of the "yes," wasn't it?

A Yes.

Q And you still agree, that would be wrong, don't you?

A There's other questions below that, that explain that answer, sir.

Q Well, there's a whole lot of questions in this depo, and we're going to cover a lot of them.

A On line 22 it says, "The handling of claims were not involved in profits," and that is also from your questions to me concerning contributory negligence.

Number one, Colorado is not a contributory negligence state, it's a comparative negligence state, and we apply the law as it is applicable on each claim.

Q I'll give you an opportunity. Do you want to say that one more time?

A I've already said it. I said we apply the law as it is applicable in the state of Colorado.

Q Good, thank you.

THE COURT: Counsel, before you go any [25] further, I want to confer with the court reporter.

Let's proceed.

Q (BY MR. CHRISTENSEN) All right, I'm going to show you a page from Mr. Peterson's PP&R. Again, his and Mr. Davis' are the only ones we have from this time frame. See the part I've

underlined, "Re-emphasize comparative negligence settlements. Strive for a 5 percent increase in the use of comparative settlements, compromises, and denials, in 1982."

You would completely agree, would you not, that is a terribly inappropriate goal.

A I would not agree that that's an inappropriate goal.

Q Didn't we just read your deposition testimony from just three days ago, where I asked you if you're aware of goals around contributory or comparative? And you said no, and I said, "Would you agree that would be wrong?" And you said yes.

A I don't recall of any goals on my PP&R. I've never seen that PP&R, sir. But I would not consider that appropriate, because if the adjuster is not doing his job, is not properly investigating, is not properly evaluating the claim, he may need guidance in order to do more thorough investigations, and properly settle the claim.

[26] Q This is Dave Peterson. He's your boss' boss, right?

A It's very likely that Mr. Davis was being lazy and just paying everything. I have no idea.

Q This is Mr. Peterson's PP&R.

A Okay.

Q To accomplish this goal he's got to get you to do it.

A And if his unit is not properly investigating claims, and are being lazy about their job, it would be a proper goal to encourage them to do proper investigations and evaluate the claims accordingly.

Q Do they give crystal balls to people at State Farm so they can foresee the coming year?

A No.

Q Mr. Peterson was able to foresee that, on the accidents that hadn't even happened for the coming year there would be 5 percent more people comparatively negligent. Isn't that what this says?

A I don't believe that's what that goal says.

Q Comparative negligence was emphasized, as Mr. Davis has testified, wasn't it?

A It's properly, it's emphasized to encourage people to properly apply the law and properly handle the claims that are assigned to them.

[27] Q Now, I want to look at a couple of your PP&Rs. And I'll put up one from recently, 1993. Do you recognize this as one of yours?

A It doesn't have my name on it, so I can't really tell.

Q Well, it doesn't on this page. Actually, I think it does, it's under the sticky. Does that help?

A Yes.

Q Do you see where it says, "All total loss settlements in excess of NADA will be discussed with and initialed by my superintendent."

You're totally free to pay somebody less than book, but you've got to get management approval to ever pay more than book; isn't that what that says?

A Each adjuster has certain authorities on settling claims, and that's a tracking device to see where our settlements are ranging. And the supervisor does want to approve anything that is settled over NADA book, and there's generally a reason for that if you're settling for more than that.

Q The reason is it costs State Farm more money, right?

A No, the reason is NADA book doesn't take into consideration prior damage, extra options on the vehicle that are not listed in the NADA book. So if there's [28] extenuating circumstances on that particular vehicle, you're going to need approval for that, sir.

Q Is this reference to NADA, is that reference to the NADA book that you said you almost never used?

A It is used only as a guide. It is not used to evaluate the total loss settlement.

Q I'm going to show you another one of your PP&Rs from 1990. Do you see where it says, "All total loss settlements in excess of current NADA must have prior approval by management."

A There again, there's a reason for that, because there may be options on that vehicle, equipment on that vehicle that are not listed in NADA, and we need approval for that.

Q But you don't need approval to pay less.

A If your evaluation is correct on your market survey, it's not a factor.

Q Now, Mr. Norman, in your deposition, you admitted that having claims representatives attempt to contribute to the profit of the division or the region is wrong. Isn't that true?

A I made that statement, and that's because we have nothing to do with profit. We handle claims. We don't, you know, depict what profit is.

Q So you admit that would be wrong.

[29] A If that was a goal to try to get profit out of it, but we aren't involved in a profit arena.

Q Profit has no place in claims handling, does it?

A No.

Q It goes on, though, at State Farm, doesn't it?

A I would say that's not something that we do in claims.

Q Is Mr. Peterson, your boss' boss, in claims?

A He was at one particular time, yes.

Q He was for his whole career, wasn't he?

A Yes.

Q This is from Mr. Peterson's PP&R. Summary evaluation, it looks like at the end of 1981, "Mr. Peterson has accomplished his 1981 goals of contributing to division profit, indemnity savings." Indemnity savings is talking about average pay per claim, isn't it?

A I have no idea.

Q Your boss' boss had a goal in 1981 to contribute to the division profit, and he spent 100 percent of his time in the claims department, didn't he?

A That's correct.

Q Now, you've testified that average pay per [30] claim is not emphasized with claims people at State Farm, haven't you?

A That's a statistical figure that comes out based on what we do pay in claims.

Q Haven't you testified, just three days ago when you were asked the question, "Was emphasis placed on controlling or reducing average pay per claim?"

And you said, "No, not as far as an adjuster was concerned"?

A That's correct.

Q Do you know who Mr. William Beenck is?

A He was a divisional claim superintendent.

Q He was the head guy over the division in Colorado, right?

A In that particular part of Colorado, yes.

Q He was Peterson's boss.

A Yes.

Q Now, we don't have his PP&Rs from the eighties, but we've got one here from 1990. Do you see average pay per claim goals there?

A Yes, I do.

Q There's a bunch of them, aren't there?

A Yes, sir.

Q Let me show you another one from Mr. Beenck. This looks like this talks about '88 and '89. A bunch [31] more average pay per claim goals, here, aren't there?

A There's average pay per claim goals, there's many ways at arriving at that, and that doesn't mean we're not paying what we owe.

Q And one way of arriving is tougher negotiations, isn't it?

A Not necessarily. A real good way of arriving at that is through subrogation, to get our money back, including our insured's deductible, and that would lower the indemnity cost.

Q Show me "subrogation" up there, that word.

A It wouldn't be in that, because they're just talking about overall figures. That's a statistical average.

Q It looks like he's going to focus, at least in part, on tougher negotiations, isn't he?

MR. SCHULTZ: Object, that isn't what it says. That's argumentative.

THE WITNESS: I don't see that there, sir.

Q (BY MR. CHRISTENSEN) You don't see, "Strong negotiations to control indemnity costs," up there?

A That doesn't say "tougher investigation." That just says, "Do your job."

Q Now, you testified that your boss, Mr. Peterson, was a real likable guy, and he never [32] lacked for tact.

A I never had any problems with Mr. Peterson.

Q You never noticed any lack of tact on his part?

A No, not really.

Q He was a tough guy if you didn't do what he wanted. You were in trouble, weren't you?

A You weren't in trouble. He'd let you know if you weren't doing your job.

Q Do you see his PP&R? He wants to work on his skills in overcoming his tendency to overreact and not be tactful in dealing with people. You never noticed that?

A I noticed Dave Peterson to be very abrupt sometimes, but I never took offense to it.

Q Now, in your deposition you admitted buck slips were used in that office; isn't that true?

A We used buck slips, yes.

Q You also admitted that they were purged or thrown away.

A Yes.

Q Not kept in the file.

A Buck slips were a tool that was used, if you got a phone call from a customer, and you had information you wanted to put

in your claim file, you [33] may not have that claim file at hand, you would take the information down on a buck slip, and transfer it to the activity log if it was needed, and then you threw the buck slip away. I mean that's just like telephone messages today.

Q You said you got rid of buck slips if it was prudent. Isn't that your exact words?

A If there's no reason to keep them, we throw them away.

Q You said, "Yes, if it's prudent," didn't you?

A That's right. And that's what I meant by prudent.

Q And you admitted that several years ago there was an instruction that came out to throw away old manuals, claim school notes, things like that.

A That's an ongoing thing. And yes, you need to throw away things that are outdated and that you don't use any more, because you're constantly getting new materials. And if you're a pack rat and continue to keep all that stuff, you aren't going to have a place to put it. I personally kept very little old outdated stuff. There's no reason to do that.

Q I asked you -- And I'm looking now at the bottom of page 24 of your deposition, line 25, last line on the page. Do you see that?

[34] A Yes, sir.

Q "Have you ever been instructed to throw away old manuals, claim school notes, things like that?"

I'm going to read your answer, you tell me if I've read it right. "A couple of years ago we were asked to purge all old stuff, to throw away all old stuff that we didn't need any more, because we needed the room in our desk and to do other things." Did I read that right?

A Yes.

Q And you used the word "purge," didn't you?

A Purge is throw away.

Q Okay, I agree with you.

A Okay.

Q I then asked you if it could have been 1990, and you said you had no idea.

A That's right, I'm not sure when.

Q So it could have been 1990?

A Yeah, it could have been.

Q Could it have happened in the same time frame that Samantha Bird, over in Utah, went to the meeting where they were told to throw things away in this state?

A I have no idea.

MR. SCHULTZ: Objection, lack of foundation, Your Honor.

[35] THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Now, you were Bruce Davis' supervisor on the Pueblo cat team.

A Yes, I was.

Q And you admitted he did a good job?

A As far as I know he done a good job. I never had any complaints.

Q In fact, you sent him a letter commending him for the good job he did?

A Yes. Everybody got one of those letters. And Bruce did, he worked hard, he put in his time, and I never had any problems with it.

Q And it's your testimony under oath that appearance allowance wasn't emphasized on that hail storm.

A That's correct.

Q Right at the very time that that hail storm, or that time frame was going on, appearance allowance was being emphasized in Colorado, wasn't it?

A Appearance allowances is a settlement option available to the customer where they have minor damage.

Q You've seen these before, haven't you? These cost savings reports?

A I generally wouldn't see those kind of reports, because that's a management report.

[36] Q But this was going on right where you worked in Colorado, unit 160. Wouldn't you expect all of the units under Mr. Peterson would have had this similar kind of information?

A Yes, that's a statistical report that management would have, and it's for the estimators. I wasn't an estimator, so I wouldn't have been involved in one of those.

Q All right, and appearance allowance is one of the things being emphasized on this report, isn't it?

A That's correct, it is a settlement option to the policy holder or claimant.

Q Let me ask you about this. I was thinking about this this morning. I remember many years ago my brother coming home from second grade saying that some child stood up at show and tell and held up a nickel and asked who was willing to trade a dime for it. Do you think any of the kids did that?

A I have no idea, sir.

Q Would it surprise you that nobody would?

A Depends how generous somebody might be.

Q I guess that's true. My brother in second grade thought that was funny. You're telling me that every time somebody's offered an appearance allowance you say, "Will you trade a nickel when you could have a [37] dime?" and they say, "Sure, I'll do it."

A That's not the correct methodology of what you have just stated. Appearance allowances are explained to the customer, in lieu of replacement or repair of an item that they could take an appearance allowance. And it's usually very minor damage.

Q You always tell them, "I can give you $500 in cash, or you can take $250 in cash. Which would you like?"

A That's correct.

Q And your testimony is that a bunch of them pick $250.

A If they felt that that part didn't need to be replaced, and they were willing to take an appearance allowance on that part, people would do that.

Q Mr. Davis' testimony was true, wasn't it, the way you get somebody to take appearance allowance is you don't tell them they can have $500.

A That's not correct, sir. You have to explain options to them.

Q You got a lot of fools over in Colorado?

A No, there's a lot of people that would rather have an appearance allowance than a repair.

Q Now, you said yesterday under oath, "There are no contests at State Farm on claims handling"; isn't [38] that true?

A I said there was no contests on the Pueblo catastrophe.

Q You admit there are contests for appearance allowance at State Farm?

A There's no contest as far as appearance allowances at State Farm that I know of.

Q This is a document the jury has seen before from Samantha Bird. Have you seen this document, sir? It's from Utah in 1986, about pride week, and -- Excuse me, pride month, and a competition?

A That's a Utah document, so I have no idea what it is.

Q You will admit that this shows a contest over appearance allowance, wouldn't you?

A I can't read that, sir.

Q Let me read it to you. "Estimatics." That's the general area you worked in at State Farm, or do work in?

A No, I'm an adjuster. I'm not an estimator.

Q Well, you get involved in estimating, don't you?

A Very, very rarely.

Q "One winner will be selected from the Sandy/Murray competition, and one winner from the [39] Ogden/Orem competition. Competition will be relating to cost savings in the following areas." You see number one is appearance allowance?

A I see that.

Q That's a contest, isn't it?

A It sounds to me like it would be an incentive for people to do their job, but I guess if you want to call it a contest --

Q You don't call competition a contest?

A No.

Q Isn't a hail storm, where you have thousands of people coming in and are going to be processed very quickly, a golden opportunity for State Farm to save large sums of money by using appearance allowance?

A No. If anything on storm duty, you're probably spending more money than you owe in most cases.

Q You claim there's no record kept of appearance allowances at the Pueblo Colorado storm duty.

A That's correct.

Q That's your sworn testimony?

A That's correct.

Q And you claim there's no record kept of appearance allowances anywhere at State Farm.

A Not that I know of.

Q We just saw one, didn't we? Mr. Davis' cost [40] savings report?

A No, that's a record kept -- That's a statistical record that is kept, but that isn't encouraging appearance allowances.

Q Now, you've acknowledged there's a banquet held for the people that went to storm duty?

A There was a recognition banquet for all the people that worked storm duty, for appreciation of their work and their time spent away from home.

Q And as people stood up, weren't good things said about what they did?

A Everyone was recognized, I would imagine.

Q And you deny that when Mr. Davis stood up, it was, the group was told how well he'd done on appearance allowance?

A I have no idea how they would even determine how well he'd done on appearance allowance.

Q Now, in your deposition three days ago you said that you saw some documents in preparing for your deposition, and I think you saw the documents on Saturday. And on Sunday you told me you couldn't remember what they were.

A Most of the things that, the documents that were there was maybe for the estimators and management. I didn't pay any attention to them.

[41] Q I'm going to go back to a document we started with. This is a document showing 73 percent of people getting less than book value for their cars. Did the Colorado insurance commission do anything about that?

A I've never known the Colorado insurance commission doing anything about how we settle total losses.

Q They didn't even know about it, did they?

A I have no idea what they know about.

MR. CHRISTENSEN: Thank you.

REDIRECT EXAMINATION BY MR. SCHULTZ:

Q Mr. Norman, you were asked a lot of questions about book value, NADA book value, and you were shown some copies of PP&Rs. And I want to go back to that for a moment. The documents that were put up on the overhead projector here from PP&Rs, some parts were underlined and some parts were not underlined; is that correct?

A That's correct.

Q Some parts were read to you, and other parts were ignored; is that right?

A That's correct.

Q And I don't expect you to recall every single word that was up there, but I've tried to make a couple [42] of notes, here. With respect to -- Or check a couple of notes, here.

With respect to the PP&Rs of Mr. Peterson, did you notice that one of the goals with respect to NADA book was he was to -- or I should say the goal book from 1979 -- that the proposed

goal was to try to, or to strive to settle claims at or below NADA book value. Now, if you settled it "at," would that be the NADA book value?

A Yes, it would be.

Q And let me also ask you, you talked a lot about what a market survey is. And I'm not sure that's been explained. When you're dealing with a total loss, what is a market survey?

A Okay, a market survey is a research of a local market, whether it be dealers, newspapers, Auto Trader magazines, all the different resources available to try and identify and locate similar vehicles to the one you're evaluating.

One of the things that we do in the process of evaluating that total loss is, we do a condition report on that vehicle, which shows the condition of the paint, the interior, the tires, mechanical condition, any options it may have, that type of thing.

When you're doing your market analysis, then, [43] or market survey, you try to find vehicles, you contact the owners of those vehicles if it's a private party, or a dealer, you find out what options those vehicles have, compare those options, mileage, equipment, condition, with the one that you're evaluating, and try to arrive at a duplicate car, if it's at all possible.

In many cases that's not possible. The customer car may have things that the other vehicle, or the replacement vehicles didn't have, so you'd make adjustments to that evaluation to credit the value of that vehicle, or discredit it if it didn't have those things. We take into consideration prior damage, or rust condition, or something of that nature.

If you've got a car you're evaluating that has the quarters and doors and sides of the vehicle all rusted out and corroded, and the paint's faded and clear coat's coming apart on it, the vehicles out there for sale may not have that. And you'd have to make adjustments for that particular vehicle and come to an agreement with that customer on what that vehicle was really worth based on the market survey.

Q Now, if you do a market survey, in your view, are you getting a more accurate view of what the actual cash value of that total loss vehicle is, than just reading something out of a book?

[44] A Much more accurate. Number one, the NADA book doesn't take into consideration prior damage or condition of that vehicle. And it doesn't take into consideration non-original equipment options. You may have a vehicle that has a luggage rack on it that wasn't available from the manufacturer, or alloy wheels that wasn't available from the manufacturer.

You're going to have to make adjustments to NADA book to fit the vehicle that you're actually evaluating. And there's a lot of factors there that aren't in an NADA book.

Q And did you say that if you're able to find a comparable vehicle at a certain price, that you give that information to the claimant?

A Yes.

Q And do you make that available to them so that they can go look at it, and if they want to buy it they can replace it for that price?

A Exactly. I always share the vehicle information with, the vehicles that I used in my surveys, with the customer, so if they wanted to replace that car with a like car, they had the option to go out and look at those cars.

And in many cases, when there was a discrepancy, where a customer felt that my evaluation [45] was incorrect based on the vehicles that I'd located, I would ask them to go look at the vehicles that I had located and compare them with theirs, and tell me where the differences were so we could come to a proper evaluation on their vehicle. It's not just pick up a book and settle a claim. You can't do that.

Q Now, you were read a couple of lines out of your deposition about NADA book value. Did you explain some of these things in your deposition, the fact that you do market surveys?

A Yes, I did.

Q Did you explain in your deposition that you look to the NADA as a guide?

A That's correct.

Q Was that all pretty much on the very same page of these three lines that Mr. Christensen asked you to read?

A I believe it was.

Q Let me refer you to page 16 of your deposition. Starting on line 1.

Question. "For a number of years the NADA book was used to value cars." What was your answer?

A My answer was, "We had the option of using the NADA book or a market survey, and that was the option of the adjuster."

[46] Q "And did you use both, depending on the situation?"

A My answer was, "I tried to do the market survey, and if there wasn't a vehicle available then I would consult the NADA book as a guide."

Q And the next question, "Are you aware of any encouragement at State Farm to pay less than NADA book value?" What was your answer?

A My answer is, "We base our estimates on cash value, not more or less."

Q Now, you were asked about the use or the application of comparative fault in handling property damage claims. Do you recall that?

A Yes.

Q And you mentioned that that is only applied in third-party claims.

A That's correct.

Q Now, can you explain why that is?

A Because an insured loss is by contract. It has nothing to do with legal liability.

Q So what we're talking about, when comparative fault is being applied by you, are cases where a third party is making a claim against a State Farm insured, claiming that the State Farm insured's conduct caused the damage to this other vehicle; is that right?

[47] A That's correct.

Q Now, in those situations, Mr. Norman, don't you have a duty to defend your insured?

A Yes, we do.

Q Don't you have a duty to make sure that, under the contract, you only pay what your insured is legally obligated to pay?

MR. CHRISTENSEN: Your Honor, most of this has been leading, and I'm finally going to object.

THE COURT: Sustained.

Q (BY MR. SCHULTZ) What is your duty to your insured in a third-party claim?

A Our duty is to protect our insured.

Q And how do you go about doing that?

A By properly evaluating the liability on that claim, and properly settling the claim with a claimant.

Q Is part of that approach looking to determine whether the person making the claim has some fault?

A Based on Colorado comparative negligence statutes, that is correct.

Q Would you be doing your job if you ignored that?

MR. CHRISTENSEN: Same objection.

THE COURT: Sustained. Proceed by non-leading.

[48] Q (BY MR. SCHULTZ) Can you ignore that?

A No, we cannot ignore it. That's your job, is to properly evaluate the claim and settle it appropriately.

Q Now, you talked about, or the testimony that Mr. Christensen asked you to read regarding average pay per claim, you said that it was not emphasized with an adjuster. Do you recall that?

A Yes.

Q And an adjuster is -- What is another word for an adjuster?

A Claim representative.

Q Okay. Then he put up on the board PP&Rs for Mr. Beenck. Do you recall that?

A Yes.

Q Now, was Mr. Beenck an adjuster?

A No, he was a divisional claim superintendent.

Q He also put up on the board part of one of Mr. Beenck's PP&Rs, and referred to the fact that indemnity costs were going to be looked at, and reviewed, and there were some goals. Do you remember that?

A Yes.

Q And he talked to you about trying to reach those goals by tougher negotiations? Do you remember [49] him saying that?

A Yes.

Q And the PP&R actually said "strong negotiations," didn't it?

A Uh-huh.

Q He also didn't read to you these other things that were on that PP&R that identified the approach to reach those goals.

MR. CHRISTENSEN: Your Honor, he can't lead this witness. It's the rule. Objection.

THE COURT: Sustained.

MR. SCHULTZ: Well, Your Honor, can I submit what was on that report to this witness? I don't know how else I can do it.

THE COURT: You can present what was on the report. But not in a leading fashion. If you want to just state what was set forth on the report and ask him a non-leading question, that would be acceptable.

Q (BY MR. SCHULTZ) Do you recall, Mr. Norman, that Mr. Beenck's report said that those goals would be met by adequate liability investigations, timely and personal contacts, and sound estimatics, as well as strong negotiations?

A That's correct.

Q Now, what is meant by adequate liability [50] investigations?

A Properly evaluating the claim, applying comparative negligence where it's appropriate, using subrogation to recover monies for our policy holder, and hopefully reimburse their deductible in that recovery.

Q Is that deceptive to do that?

A I would not think it's deceptive to protect our policy holder.

Q What is meant by timely and personal contacts?

A Timely contacts on any claim, whether it be first party or third party, is a customer service factor. We solicit most claims on property damage, we solicit all claims on insured damage.

Q And sound estimatics, what is meant by that?

A That's to pay what we owe on that particular claim to put that vehicle back in pre-accident condition.

Q Now, if these types of goals are met, or these types of practices are used, adequate liability investigations, timely and personal contacts, sound estimatics and strong negotiations, what do you expect the outcome is going to be as far as whether State Farm is paying what's owed?

A We're going to pay what's owed, and we're [51] also going to control the costs that we pay.

Q Now, you were asked some questions about the rental vehicles that were made available. Do you recall that?

A Yes, I do.

Q And you were asked about the question of making an offer on a total loss, and then giving the claimant five business days --

A Uh-huh.

Q -- to make a decision? Now, can you explain whether or not there is a need for some kind of a deadline, in your view, to try and get such a claim settled with respect to a rental?

A On a claimant situation, which would be a third-party claim, we owe that loss of use by law. And yes, there would be a need to control that cost, because if you didn't cut it off at some point in time, that claimant could rent that car indefinitely, for no need.

You have to be able to control that cost, because that is a payment we're making off that claim file. And why should we be spending the money our insured's paid in premium for an unwarranted expense? That's expense adjustment that has nothing to do with whether it's needed or not. It's an adjustment.

Q Would it be responsible claims handling to[52] let a rental go on indefinitely?

A No, it would not. I mean you shouldn't do that. I mean it's unrealistic. Most of my claims handling is based on common sense.

Q You were asked a couple of questions about contests, and you were shown a memo from Utah from 1986 that you said you had no information about?

A Right.

Q Do you recall that? I believe that memo indicated that with respect to this competition, whoever won was going to receive a dinner or something, not to exceed $25 per person or something like that, and I think another one of them was $15. And we could check that if we need to, but I recall there was something to that effect, Mr. Norman.

I just want to ask you, are you willing to sell your integrity for a $25 dinner?

A I wouldn't. I'm proud of myself, and I wouldn't jeopardize my integrity over a free meal.

Q Now, Mr. Davis has testified that he did all kinds of dishonest things and got a $7.50 beach blanket. Are you aware of that?

A I'm vaguely aware of the comments, yes.

Q Did you do that in the Pueblo storm duty?

A I got a beach blanket, too. I also got a [53] wind breaker. But that wouldn't phase my integrity over a $10 jacket and a $7 blanket.

Q You mean to tell this jury that you wouldn't cheat hundreds and thousands of people to get a jacket?

A My conscience wouldn't allow me to do that, sir.

MR. SCHULTZ: That's all.

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EXCERPTS OF TRIAL TESTIMONY OF ROBERT D. NOXON, JULY 18, 1996

[Vol. 26, R. 10281, commencing at p. 124]

* * *

ROBERT D. NOXON called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified [125] as follows:

DIRECT EXAMINATION BY MR. BELNAP:

Q Mr. Noxon, will you tell us what your full name is, and what city you reside in?

A My name is Robert Dean Noxon, and I live in Damron Valley, Utah.

* * *

Q Are you currently employed?

A I am, yes, sir.

Q Who do you work for?

A I've worked for thirty-one and a half years for State Farm Insurance.

Q Where were you born and raised, Mr. Noxon?

A I was born in Central Illinois, and lived there until 1979.

Q And is that when you moved to the state of Utah?

A Yes, I got out to Utah April 1st of 1979.

Q When did you start working for State Farm Insurance?

A I began with State Farm in, on February 1st of 1965.

Q What's your educational background?

[126] A My college degree was at Illinois State University, which is in Normal, Illinois, and my major was in business administration.

Q When you started at State Farm, what was your job title?

A Well, in those days when you started with the company, we had what we call combination field claim representatives, and your job was to go out and investigate all kinds of claims, property damage claims, injury claims. We even had some homeowners claims that we investigated then.

Q Are you aware, Mr. Noxon, whether or not the fire company, the fire insurance company, started its own claims department, I think the testimony in this case has been, sometime around 1970?

A That would be my best recollection, would be in 1970, '72, something like that, they began having their own claim handlers, yes.

Q Now, since that time, have you worked solely for the auto company?

A Yes, at that time we had an option of whether we wanted to go with the fire company if we were already on board, or we could choose to stay with the auto company, and I chose to stay with the auto company.

Q Now, when you were transferred -- Strike [127] that, let me ask another question. Did you go to any auto training schools during the time that you, the first few years with State Farm?

A Yes, I went to what's called claims school, which I started in January, or February 1st, and went to claims school in March. I went to a two-week auto appraisal school that same year. You go through many different types of training schools over the years. But those are the first two that I went to.

Q When you transferred out here to Utah, what was your job?

A I had kept the same job from February 1st of '65, there are different grades of what's called a field claim representative, and I had moved up from, it's called FCR-1, FCR-2, FCR-3, I was at the top of that grade, but I was still handling claims the same as I had been in 1965.

Q And that was what you did when you first moved to Utah in '79?

A Yes, it was.

Q Can you just briefly walk the jury through the different positions that you've held at State Farm since then.

A Since I started?

Q Since '79.

[128] A Okay. When I got to Utah in April of '79, as I mentioned, I was a field claim representative 3, I believe it was, and in November of 1980 I was promoted to a claim supervisor in the Murray service center. I held that position for eighteen months, and I became a claims superintendent in Ogden, Utah, in July of 1981.

In January of 1983, they asked me if I'd take a lateral transfer to Colorado Springs as a superintendent. I did that in '83, I was there until March of '85, at which time I became a divisional claim superintendent back in Utah.

Oh, and then one more step. In 1993 -- these dates kind of run together after a while -- in 1993, I decided that I enjoyed St. George, Utah, a lot more than I did Salt Lake, and I asked the company for a transfer to -- Well it would be a transfer and a demotion, because they didn't have a divisional claims superintendent in St. George, so I became a superintendent in St. George, Utah.

Q And is that where you're currently working?

A Yes. I should say that I have three offices that are under my supervision, St. George, Cedar City, and Richfield, all three of those offices report to me.

Q Mr. Noxon, with respect to the Campbell file, you've indicated to this jury that you became a claim [129] superintendent in Ogden in July of 1981; is that correct?

A That's -- Yes, that was --

Q And as a new superintendent, do you recall the Campbell case?

A Well, yes, I do. Obviously.

* * *

[144] * * *

Q Now, did you learn, Mr. Noxon, that this case was tried, and it resulted in a verdict in excess of the limits, and a finding of 100 percent fault against Mr. Campbell?

A I did learn that, yes.

[145] Q And what was your reaction to that, as you had understood the case when you left?

A I would say two things. Shock and disappointment. I absolutely could not believe that we could get hit for 100 percent negligence on this, and I guess I was just disappointed that it had turned out this way. I never, in my wildest dreams, expected us to get nailed for 100 percent negligence.

* * *

[147] * * *

Q Now, Mr. Noxon, the jury last fall made a determination that State Farm, when they tried the case, when the case was tried in Logan in 1993 --

A '83.

Q '83, thank you. There was a substantial likelihood of an excess verdict, and that the decision [148] to try the case was not reasonable. Are you aware of that?

A I am, yes.

Q Do you accept that jury's conclusion from last fall?

A Well, I'd have to say I accept both juries' verdicts. I feel that's the system that we work with. I do feel that there were some things that maybe the jury in October weren't aware of that might have made them look at it differently. That's my opinion.

Q Now, with respect to the findings, Mr. Noxon, how do you square the fact that before the case was tried, you felt like you'd made a fair judgment, or assessment, and last fall you told the jury that you thought Mr. Bennett's handling of the case was appropriate. How do you square that, Mr. Noxon, now, looking at that in terms of what you see the case for in totality now?

A Well, I hope I'm answering your question.

Q Well, if you don't understand it, it may not have been a very good question. Let me --

A Well, I would say that, but I wish you'd re-ask.

Q Let me try and rephrase it. In hindsight, Mr. Noxon, with the benefit of hindsight, knowing what [149] you know now, can you tell this jury, as a superintendent, if you had this to do over again, would you have settled the case in Logan?

A Well, I wish I could make all my decisions through hindsight. This, the business that we're in is a business of making judgments, and sometimes you, hopefully you make right judgments.

Two juries have told me that I made a wrong judgment in this case, so I would say, yeah, I'd have settled the case. I feel that Bob Noxon and Bill Brown and everybody that was involved in this made a judgment, and a jury's told us we were wrong. I'm not going to sit here and say the jury's wrong.

* * *

[154] * * *

Q (BY MR. BELNAP) Mr. Noxon, I want to move to another area. Did you become aware, when you became a superintendent in July of 1981, I think you said; is that right?

A Yes, it is.

Q And obviously, was the Logan office part of your responsibility at that time?

A Yes, I had responsibility for Ogden and Logan.

Q Okay. And Mr. Summers obviously worked in Logan; is that correct?

A Yes, he did. He was one of four people up there.

Q When you became a superintendent, who did you replace in the Ogden office?

A I replaced a gentleman named Tom McGlinn, who [155] had been the superintendent for, since April of '79, had taken a lateral transfer to Colorado, so he was a superintendent in Greeley, Colorado at that point.

Q Did you have any discussion with Mr. McGlinn about Mr. Summers relative to a situation that this jury's heard referred to as the Monsanto case?

A Yes, I did. When I took over, Tom basically sat down with me and, Mr. McGlinn sat down with me and we talked about, as you would with any new office, about some of the employees. And Tom mentioned to me that he'd had one problem with -- Well, he had one problem with Ray on this Monsanto memo that we're talking about.

MR. HUMPHERYS: Your Honor, I would object on the basis of hearsay. He's not here to testify.

MR. BELNAP: Well, Your Honor, it's in evidence. It's not being offered for the truth of the Monsanto matter. That's been testified to. Just the communication that, in fact, was there communication regarding Mr. Summers on that matter.

MR. HANNI: It's being offered, Your Honor, for the fact it's said, not for the truth of the matter.

THE COURT: I'll allow it, overruled.

Q (BY MR. BELNAP) Please continue, Mr. Noxon.

A I'm sorry, now I've lost where you want me to --

[156] Q I just want to know, just very briefly, what Mr. McGlinn told you about Mr. Summers relative to that matter that this jury's heard about.

A Okay. He sat with me in his old office, my new office, and we talked about Ray Summers and some of his, as you do with all your employees, kind of a thumbnail sketch of what each one was like.

And he mentioned to me that he'd had this problem with Mr. Summers involving the Monsanto issue, and I believe that he showed me a copy of the memo that he had sent to Ray telling him, you know, "This is not proper, you're not to do this. If you do this again you could be terminated," I believe is the way the memo read.

Q All right. Did there come a point in time, Mr. Noxon, while you were a superintendent, when you received a telephone call from Mr. Bennett about a case known as Gittens?

A Yes.

Q Was that in September of 1981?

A It was, yes. I believe I received that phone call at my home one night.

Q Let me represent to you that Mr. Bennett -- and I think the record will reflect this -- was in Logan where Mr. Summers' deposition was being taken, I believe, on [157] September 4th of 1981. I'd also like to represent to you that Mr. Bennett took the deposition of the Gittens woman, I believe, on September 9th of 1981, and at that time was advised by Mrs. Gittens, when he showed her some bills, that she had never incurred those bills and confronted Summers about that. Do you recall that sequence, Mr. Noxon?

A Yes, I do. That's basically the way I remember it happening.

Q After Mr. Bennett reported this to you, did you -- Who did you report it to?

A Well, I obviously contacted my immediate supervisor, who was Bill Brown, the divisional claims superintendent, who was down in Murray, and told him exactly what Wendell had told me.

Q Now, this jury is aware that Mr. Summers' deposition was taken on September 4th in the Gittens case, and then after it became known, as he advised Mr. Bennett, that he had created some bills that he represented, and has told this jury about, Mr. Bennett took a sworn statement from him on September the 18th, 1981, did he not?

A Yes, he did. And I believe it was in Wendell's office, yes.

Q Now, after -- Let me state another matter. [158] In these statements of Mr. Summers, Mr. Noxon, have you had an opportunity to review those at any time?

A Yes, I have reviewed them in the past.

Q Let me represent to you that Mr. Summers has testified in this case, to this jury, that he was ordered to take three different releases from Mrs. Gittens, and that he was ordered to create those bills that he refers to in the file, and that this was not a proper settlement. I want to represent that to you, as a summary of his testimony.

Under oath on two different occasions, Mr. Noxon, did Mr. Summers indicate that this was a bona fide settlement that was worked out with this woman, Mrs. Gittens?

A Are you saying is that what he testified to under oath there?

Q Yes.

A Yes, I believe he did.

Q And did he tell Mr. Bennett, after he had testified to Mrs. Gittens' attorney that the bills were bona fide, did he then tell, do you know whether or not he told Mr. Bennett that he had created those bills?

MR. HUMPHERYS: Leading, Your Honor.

MR. BELNAP: That question wasn't leading, Your Honor. But I'll rephrase it if you'd like.

[159] THE COURT: Rephrase it.

Q (BY MR. BELNAP) Do you know if Mr. Summers told Mr. Bennett that he created those bills, after testifying to the contrary a week or two earlier?

A That's exactly what he told him.

Q After you were aware of this and advised Mr. Brown of this, do you know what job action Mr. Brown took with respect to Mr. Summers?

A Well, there was a series of events that occurred after that. Mr. Brown talked to Mr. Summers directly, then Mr. Brown contacted me and informed me that he had visited with upper management in Greeley, Colorado, where our regional office is, and we were instructed to put Mr. Brown, Mr. Summers on a company-initiated leave of absence without pay for two weeks while we checked out these allegations.

Q Did you do that?

A Mr. Brown and I, he came to my office in Ogden, and it seems to me like we pulled seventy, either files that were in progress, or old files of Mr. Summers, to look to see if we could find any other improprieties in those files.

Q Did you put Mr. Summers on leave without pay?

A Oh, yes, we did, for two weeks.

Q All right. What did you determine from [160] looking at that sampling of sixty or seventy files?

A We couldn't --

MR. HUMPHERYS: Your Honor, we would object. We've not had access to these files, it's improper because we can't cross examine.

MR. BELNAP: Your Honor, I'm happy to move on. This was inquired into in his deposition two years ago, and

I'm just laying some foundation for the plaintiffs' implication in this case that Mr. Summers' termination was somehow related to this accident.

THE COURT: Approach the bench.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. BELNAP) Mr. Noxon, after looking at these files, was Mr. Summers put on probation after returning to work with two weeks without pay?

A Yes, he was put on probation from then until the time he was terminated. Or took early retirement.

Q Now, after he came back, Mr. Noxon, from leave without pay, and he was on probation, what were the terms of his probation? Just generally?

A Well, generally -- Obviously we didn't ever expect to see another falsified medical bill in his file. We expect -- There were other problems that we were having with him, not as serious as the Gittens [161] thing, but, you know, we expected him to report properly, to investigate properly. We just expected him to do his job the way he was supposed to have been doing it all along.

Q Was there any problems with him not being at the office?

A Yes, there were. I was getting calls from his co-workers, complaining about the fact that he wouldn't show up at the office, and he'd have people that were there waiting to visit with him. And you know, obviously that person gets upset, and then they take it out on the people who are there, usually a secretary, it seems like.

Q Now, after that, when he came back in the fall of 1981 on leave and was put on probation, can you just describe to the jury what his performance -- How would you describe his performance over the next several months, Mr. Noxon?

A Well, I guess I was pretty much amazed at what happened. When I took him off the leave of absence, I actually went up to his house in Hyrum, Utah, and he was putting a new roof on his house. And I got him down on the roof and we talked about the problems that we'd found, and I talked to him about the severity of it, and I said, "Ray, I'd really like to help you [162] through this thing, but you've got to work with me."

And of course he was very believable when he told me, "Bob, this will never happen again. You're not going to have any more problems with me, ever." And that's what I expected would happen.

But what I found really happened was the opposite. His work, he'd always had problems with reporting and being available to people and those kind of things. But after I put him on probation it got a lot worse. His files actually deteriorated from where they were prior to the time he went on probation.

Q Did there come a point in time, Mr. Noxon, where -- Let me ask you this. The question may be asked, considering the Monsanto matter that you've talked to the jury about, and then the Gittens case, Mr. Summers was not terminated when Gittens came along. Can you tell this jury if there was a policy at State Farm regarding trying to counsel with employees, rather than terminating them?

A Well, my feeling is, and has been for thirty-one years, that State Farm's attitude with employees is, if you have a problem they're going to try to work with you. But you have to be willing to work on it. I don't feel like we indiscriminately fire or force anybody into early retirement. I feel like the upper [163] management of this company is very compassionate that way. And that was what I saw happening in this case.

Q Now, did there come a point in time when people above you in the personnel department and the regional vice president's office made a decision that Mr. Summers' job performance was not acceptable?

A Well, actually I went to them in March or April. I had continuing problems, and actually worsening problems with Mr. Summers from October until his resignation in May. And I went to them and recommended that we terminate him, because I just felt like his job performance was totally unacceptable.

Q And ultimately did you ask him to come to Ogden and take him to a hotel room where the personnel manager was?

A That's correct, I did.

Q And at that time was he offered early retirement or termination?

A We went through all the benefits that he would get if he took early retirement, and if you don't take early retirement and you're terminated, there's some benefits that you would lose. And we went through every one of those with Mr. Summers and said, "We need to know right now what you're going to do." And that's what -- He chose early retirement.

* * *

[167] * * *

Q I want to move to another subject, Mr. Noxon, on average paid costs. Currently, as a superintendent, do you have average paid cost goals?

A No, I don't, and I don't believe anybody does.

Q And have there been times in the past, as a superintendent, where you would find average paid cost goals in some of your PP&Rs?

A Yes, in years past there have been average paid costs in some superintendents' goals, yes.

Q Now, I want to show you a memo from yourself to Samantha Bird, August 3, 1990. And I'd like to read the bottom two paragraphs of this.

"As you can see, your average paid cost is much higher than the rest of the division, and although there may be some logical explanation, I feel this is definitely an area of concern, and one that you need to be very aware of. I realize that a few large dollar claims can skew your numbers, but it seems that you may have a problem that you can work on. I am not being critical, but feel that this could be a pattern, and would like for you to monitor your average paid costs very closely."

[168] Mr. Noxon, what did you intend, in terms of this memo, that's not self-explanatory by the words itself?

A Well, as I look at that, and as I would hope anybody would look at that, when your average paid cost is double what the next highest one in the division is, all I'm saying to Samantha is, I thought I explained it in the second paragraph, I'm not saying that she's done anything wrong, I'm just saying that, "This is something you need to be aware of."

Any time you're in a business, you should be monitoring your costs. That doesn't mean that -- Sometimes an average paid cost, there's absolutely nothing you can do about it. If you get hit with two or three very large claims, it's going to push your average paid cost up. And the bottom line is, I believe that's the only memo I ever sent to her on average paid costs.

Q Have you had any pride months?

A Have I personally?

Q As a divisional?

A Yeah, as a divisional. It seems to me like we had two or three pride month deals.

Q When did State Farm here in Utah quit having pride months?

A I would guess in about 1989, something like [169] that. '88.

Q There's been a memo that was up yesterday with some witnesses where, in categories, if a person came in first, or whatever you want to call it, they would get a $25 dinner or something like that. Are you aware of that, Mr. Noxon?

A I think that was the top prize at one point, yeah.

Q What were your intentions, Mr. Noxon, in terms of handling claims during the time that there was a pride month going on?

A My intention during pride month, and any month, was you handle the claims on the basis of what it's worth, and you evaluate it fairly and promptly and properly. I felt like more of the goals had to do with trying to reduce pendings. Every one of those things that was in pride month I thought was an awareness thing to make people aware of the fact that, "Try to do as much as you can to support our agency."

Actually, pride month was an agency event, and we were trying to tie some things in from an operations standpoint to make it look like we were trying to work with the agents and support them in their project.

Q I want to quickly move to another area. And [170] that is, there's introduced into evidence in this case the Excess Liability Handbook. Have you ever seen that handbook, or used it?

A I've never used it. I have seen it in conjunction with this case. I'd never even heard of it until I heard about it with this case.

Q Now, if you put part 5 of that handbook up against Article 14 of the claim superintendent's manual, there are similarities between the two. Have you ever reviewed those two side by side?

A No. I really haven't.

Q I won't take the time, the jury's been through that a couple of times and had pointed out the differences. With respect to PP&Rs, there has been testimony in this case, and I believe they're in evidence, Mr. Noxon, but if I were to represent to you that Mr. Summers' PP&Rs do not have average paid cost goals in them, do you have any different understanding?

A Are you saying that his PPRs do not have average cost? I would say that's correct, they don't.

Q Okay, I'll represent to you that his goals talk only about reducing pendings when it comes to bodily injury claims.

A I would say that --

MR. HUMPHERYS: Excuse me, Your Honor. We're [171] still getting leading questions, here. The mere fact that he's representing it doesn't make them non-leading. We need to know what Mr. Noxon really knows.

THE COURT: Proceed with non-leading questions at this point.

Q (BY MR. BELNAP) Is the goal of reducing your number of cases that you're working on, does that have any statement that you're going to reduce what you're going to pay on any of those cases?

MR. HUMPHERYS: Same objection, Your Honor.

MR. BELNAP: Let me rephrase it.

Q (BY MR. BELNAP) Mr. Noxon, does reducing pendings, what relationship does it have to what you're going to pay on a claim, if any?

A Well, if you talk about reducing pendings, actually to reduce pendings sometimes your average paid cost is going to go up. Because to get your number of open claims down, you might have to pay more. So as your pendings go higher, that's an indication that maybe you know you've got to take a look at what you're doing on your evaluations.

But what I've always found is that if you can reduce your pendings, you can do a better job of handling your files. You can service the public better.

I'd like to clarify one thing. If you find [172] that pendings are going up drastically, I think that's the result of somebody who's not properly evaluating. So if you under evaluate claims, your pendings are going to go up, and the only way you can get them down sometimes is if you over evaluate them. So what we're saying is you've got to maintain control of your pendings at all times.

MR. BELNAP: That's all the questions I have.

CROSS EXAMINATION BY MR. HUMPHERYS:

Q Mr. Noxon, we've heard testimony today that State Farm does not keep any record of bad faith claims, punitive damages, excess verdicts, that type of thing. Has that been your experience?

A That's -- Yes, it is.

Q And I think this jury has seen Mr. Short's answers to discoveries, answers to formal questions submitted by us, and they've seen this -- I don't want to take a lot of time with it. But he's asked about third-party claims and what excess verdicts there are, and he says "Defendant has inquired of claims management." It's hard for me to see this with that light on. "Inquired of claims management personnel. They cannot recall any other excess verdicts during the 1980s other than the Campbell case."

[173] And I think there was another interrogatory that we looked at that said something similar to the extent that, or to the effect that they don't keep, or that State Farm doesn't keep such information. Here's his signature in January of 1994, and here he swears under oath that "the same are true and correct to the best of his information, knowledge, and belief," and it's signed by a notary.

Is that your understanding, Mr. Noxon?

A Is what my understanding?

Q That State Farm does not keep track of those cases?

A It's my -- I know they don't keep track of them on a local level. What they do on a national level, I don't know.

Q All right, I'm glad you clarified that. Let me have you draw your attention, now, to an office memo, this is dated 1986, from Paul Short to Bob Noxon. That's you, isn't it?

A Yes, it is.

Q You were the divisional claim superintendent at the time, Paul Short was the claim superintendent.

A The same as claim supervisor.

Q Supervisor, excuse me. And it's apparently minutes of a meeting, or staff meeting notes; is that [174] right?

A That would be correct.

Q And you have all of these people that are on it that were attending. I'd like to show you now -- When it says from Paul, does that mean he was summarizing the events of the meeting?

A I would assume that's what he means, yes.

Q And you received a copy of this, would you have not?

A I assume I did, yes.

Q And you would be directing these meetings, wouldn't you?

A I was the divisional, I was the only divisional there at the time.

Q So that means you would be directing the meeting and presiding?

A I assume it would, yeah.

Q Would you read us item number 6?

A "A list is to be maintained for these types of losses. Those falling into this category would include claims for punitive damages, bad faith, excess exposure."

Q Et cetera.

A Et cetera.

Q Aren't you making that assignment to Paul [175] Short back in 1986, to keep a record of those cases?

A I don't know that I am or not. I can't ever remember keeping lists of those, no.

Q Are you saying that that isn't what it means? What it appears to be?

A That's what it appears to be. I'm just telling you, I don't ever remember keeping a list of those. And I don't know who told him to do that.

Q Weren't you presiding in this meeting, Mr. Noxon?

A I wasn't the only one at the meeting. There were other people allowed to speak.

Q Well, you had the authority to make that assignment, didn't you? Was there anyone from the regional office or home office there that would have made that assignment?

A Craig Boltman was there, but he wouldn't have done that.

Q Okay. And so you made that assignment to Mr. Short, didn't you? To keep those records.

A Well, I don't think that's an assignment to Mr. Short. That's his saying, the way I read that, that's his saying that that's what we should be doing. That's not his assignment, no.

Q "Is to be maintained." That's not just a [176] "should." That is an "is," isn't it?

A I didn't disagree with that.

Q Where are those records, Mr. Noxon?

A I don't know that any were ever kept. I can tell you there weren't any kept locally.

Q This is a local meeting, isn't it?

A It is.

Q Would you agree with me, Mr. Noxon, that one of the hallmarks of someone who is not telling the truth is someone who changes their testimony under oath?

A I believe you've asked me that question once before, haven't you?

Q And you admitted it, didn't you?

A If you change your testimony, I think that's true. I don't see what's wrong with a person being able to change their opinion.

Q All right. Let's talk about, now, the changes in your testimony.

A I thought those were changes in my opinion.

Q Okay, let's talk about it and see. Do you recall your deposition being taken in 1994?

A Yes, I did.

Q And do you recall testifying last October?

A Yes, I do.

Q And do you recall, at least in six different [177] areas you changed your testimony.

A No, I don't.

Q All right, let's go through them, then, and let's explain to the jury the changes you made, and why.

All right, the first one, do you recall in your deposition testifying that at the time of the claim committee report you did not have adverse evidence, and that it was not proper to evaluate a case without adverse evidence?

A I recall -- Can you repeat that for me?

Q Sure. You recall in your deposition testifying that at the time of the claim committee report you did not have adverse evidence, and that it was not proper to evaluate the case without the adverse evidence.

A I did testify that way, and I would go on to say that you, we had every intention of getting the adverse evidence, and did.

Q All right. And at the trial, however, you testified that you did consider the adverse evidence, didn't you?

A I said that we had talked about adverse evidence when I put on my claim committee, yes.

Q All right. Now, I'd like to test that a little bit more, because of what you've said today. [178] We've all seen this. This is the claim committee report. Do you see that?

A Yes.

Q Now, I'm showing it mainly for your benefit to refresh your memory. Here Mr. Brown and the other claim committee members are saying, "After a careful review of the entire facts, the committee feels that the insured driver's actions," that's Mr. Campbell, "were not a proximate cause of this accident, and we should defend any action brought."

Now, isn't it true, Mr. Noxon, that you had insufficient information to draw that conclusion at the time the claim committee report was done?

A It's true that we didn't have all the information. I felt that we had much information at the time the claim committee was done. If I were doing the claim committee in 1996, I probably would have waited six months before I did it, but I didn't do that in 1981.

Q Now, we got even some conflicting testimony from you during the trial. Do you recall during the trial last October that you said that you reviewed the adverse evidence orally, even though it wasn't in writing? Do you remember saying that in your testimony last October?

[179] A I remember talking about the fact that I felt like I presented all the information that I had at the time, either orally or in the report to the committee, yes.

Q All right. Let's look now at your testimony from last October. Now, this looks a little different, because our computer has taken out all the extra lines to save space and put two pages on one. Now I'd like to draw your attention to page 1,469 of the prior transcript.

* * *

[180] * * *

Q (BY MR. HUMPHERYS) Look at line 19 and read with me. "All right, now, with this context --" Now, we'd just been talking about what you had and what you didn't have at the time of the claim committee report; do you recall that?

A Yes.

Q All right. "Now, with this context, State Farm prepared a CLR with essentially no adverse evidence. Do you agree with that?"

Your answer was, "That's right."

"Let's go to the claim committee report." The CLR wasn't what we just looked at. This is the claim committee report. The CLR is what Ray Summers prepared; is that right?

A That's correct.

Q "Tell me what, if anything, in your claim committee, the record should show is adverse to State Farm's position."

[181] And your answer? Please read it?

A "Nothing in that report."

Q So you agreed that there wasn't anything in your claim committee report that was adverse to Mr. Campbell. Now, let's go on. Line 3, "All right, do you agree again, Mr. Noxon, that in order for a company to fairly evaluate a claim they must consider adverse evidence?"

And your answer, "I think, during the course of the investigation, yes, they should."

"And so at the time of the claim committee report they had no adverse evidence?" And read your answer, please.

A "At that point, no."

Q Now, how on earth, Mr. Noxon, have a claim committee state that they made a careful review of the entire facts, and can reach the conclusion that there is no fault on Mr. Campbell, and this case must be defended, when you have just admitted there was no adverse evidence in the claim committee report?

A As I mentioned to you in October of last year, the fact that we did not have all the adverse, any of the adverse evidence at that point, we had indications that there were adverse witnesses out there, and we had every intention of getting those people's [182] version of this accident by means of depositions. I mentioned that in October, and that's the way we did it.

Q Okay.

A We made a decision, and then we evaluated it from then on.

Q Okay, I just want to make sure that we understand. I gave you an opportunity later on, on page 1,482 on our version, but I'm not sure on yours, maybe it's 1,481, and I asked again on a separate occasion.

MR. BELNAP: 1,481.

THE WITNESS: What line?

MR. HUMPHERYS: Line 23.

Q (BY MR. HUMPHERYS) "Was there any adverse evidence in your file at the time you did your claim report?" And what was your answer?

A "There was not." Keep in mind that there was a CLR which talked about the fact that there were witnesses out there who were adverse to us. And there was a police report who said that there were some people who were, he wasn't sure how they were testifying. That was not in my claim committee report, but that was in our file, and we were going to follow up on that, and we did follow up on it.

* * *

[185] * * *

Q All right. So you have first said that it was inappropriate for the claim committee to have reached that determination back in 1994, and you changed that testimony in '85. That's correct, right? Have we gone through all of that now?

A Which dates are you giving me? '84 and '85?

Q '94. If I said '84, I'm sorry.

A Okay.

Q It would be '94 that, when we took your deposition, when you said that it was not proper to evaluate the case without the adverse evidence as was done in the claim committee report?

A I'm saying, what I meant then and what I'm saying now is that it's not proper to evaluate the case without all the evidence, and we got the evidence.

Q But at trial last October you said you had sufficient adverse evidence in order to evaluate the [186] claim committee report.

A We made a determination on the claim committee at one point in time, with the idea that we were going to get all of the information, which Mr. Bennett did in the form of depositions. Once that information was in, we can always file a claim rehearing and decide if we want to stand on our position of defense, or to settle the claim.

Q But you never did, did you?

A Never did what?

Q Never did refile the claim committee, didn't you?

A We re-evaluated that case every time another piece of --

Q Please answer my question.

A I am, sir.

Q Did you ever file another claim committee request, other than this one that we've just seen, until after the trial?

A We evaluated that case every time a piece of information came in, and we made the decision with the information that we had, that we felt we could defend our insured.

Q Let me ask it one more time. Did you do any further claim committee review after this one we've just [187] seen, in September of '81, until after the trial in September of 1983?

A The only reason you would do a claim rehearing is if you felt that there was other information which had changed your original evaluation, and we did not feel that that came in.

Q And so there was no other claim committee review, was there?

A That's just what I said.

Q That's all I needed you to say. All right, let's go to the second area you changed your testimony.

Do you recall in your deposition in 1994 that the claim committee evaluation, this one we've just looked at, was premature in light of the lack of evidence?

A I think I said a few minutes ago that if I were doing this same committee now, I would have waited later in the handling of the file.

Q But isn't it true last October that you then testified that the information you had at that time, in September of '81, was adequate for you to reach the conclusion that you reached?

A I felt that the information we had indicated that Mr. Campbell was not at fault, yes.

Q Okay, let's look at a third area where you [188] changed your testimony. In 1994, in your deposition, didn't you admit to me that the evidence you had was insufficient in September of 1981, quote, "definitely," or to conclude, quote, "definitely there was no negligence," end of quote?

A I believe what I told you in 1994 --

Q '94.

A -- was that I think the use of the word "definitely," "we're definitely going to defend this," when you sit and pick a case apart for fifteen years, that sounds very strong. I also feel that that's not necessarily the way that we do our business. You're going to evaluate the claims, and if you see something to make you change your mind, you can still do that. The word "definitely" is very strong, yes.

Q And you admitted that that was probably, the evidence was insufficient to have reached the conclusion, in September of '81, that it was definitely not a case of liability.

A If you reach that decision and never take a look at the information again, yes, that would be wrong. We took, we looked at the information as it came in.

* * *

[192] * * *

Q Okay. And then do you recall at trial last October, you testified that you saw absolutely no evidence that Campbell could be found at fault?

A I said then, as I've said before, I don't feel Mr. Campbell caused this accident.

Q But isn't it true that in the trial you said, as you have reviewed all of the information, you found no evidence to support a claim that Mr. Campbell was at fault?

A I guess I thought I just answered that.

Q So the answer is yes, that's the way you [193] testified?

A Whatever I testified to.

Q Let's go to item number six, perhaps this is one of the more significant ones. This was raised earlier with Mr. Belnap.

Do you recall in your deposition testimony admitting that Mr. Bennett did not do an adequate job in three areas, first, you didn't think he properly disclosed the risk to Mr. Campbell, second, that Mr. Bennett did not exercise good judgment, and third, that Mr. Bennett had a bias to defend the case? Do you remember testifying that?

A I do remember testifying to that effect, yes.

Q And do you recall last October when you testified that you said, after reviewing the transcript of Mr. Bennett's

deposition, and everything else that you said you reviewed, that you now felt that Mr. Bennett had done everything properly, and did a great job?

A That was my testimony, and that's the way I believe. I had a chance to review volumes of documents after my deposition, and I feel very strongly that Mr. Bennett did a good job.

Q I find that interesting, Mr. Noxon, because you were the person in charge of this file, were you [194] not, back in 1981 and two?

A Yes, I was.

Q And it took you until just before the October trial to read all of the information to determine whether an adequate job was done?

A I had no reason to read that file until October of 1995.

Q What about when you were over the file? Didn't you read it then?

A I was reading the file, obviously. But I left in January, the trial was in September. I felt, from the time that I assigned the file to him until I left in January, that Wendell had done a good job.

My disappointment, I think, is what anyone's would be. When I left I thought we had a winner, and when I found out in September of '83 that we'd lost it, I was disappointed. And the first thing I thought was, "Wendell must have done something wrong."

Q Now, at the time of your deposition, you had reviewed the file, hadn't you? In fact, we reviewed it together during your deposition.

A I had not reviewed the file like I reviewed the file after my deposition, no, that's what I said.

Q But you reviewed it. I'm not saying like you did after.

[195] A Yes, I'd looked at the file, yes.

Q Did you --

A I had not --

Q Did you spend almost a day per quarter inch, reviewing that file for an attitude adjustment?

A That's ridiculous. No, I never.

Q You attended that 1986 divisional superintendent's claim conference, didn't you?

A I was a divisional in '86, so I'm assuming that I did, yes.

Q And you recall that that's what one of the speakers told you to make sure that was done in bad faith claims, that the claims personnel handling the file go through it, laboriously, and spend a day per quarter inch of file, reviewing?

A I've never heard that before, no. If I heard it in '86, I can guarantee you I don't remember that.

Q And how important it is to make sure that there's an attitude adjustment with the claims person before they testify?

A I've never heard that, no.

* * *

[196] * * *

Q Now, you've destroyed all your PP&Rs prior to 1992; is that right?

A I think I have two PP&Rs at my office.

Q Of what date? '93, '94?

A No, like '94, '95.

Q I think we were able to get two or three years early in the eighties, through a different source, but you personally don't have anything prior to '94; is that right?

A There's no reason for me to retain my -- I don't destroy them, I recycle them. There's no reason for me to retain them for ten years. I don't see any purpose in that.

* * *

[205] Q Okay. All right, now, I'd like to change gears a little bit, and ask you a few questions. You mentioned, when you were talking about Samantha Bird and some others, that you always tried to give fair value on your claims; is that right?

A Yes, that is correct.

Q Have you ever seen any low balling at all in State Farm in all of your years?

A I haven't. I've seen high balling by plaintiff's attorneys, but I haven't seen low balling.

Q Have you ever seen any violations of unfair claims practices?

A If I had, I would have reported them.

Q Did you report Mr. Summers?

A I don't know that Mr. Summers did anything to hurt the claimants in the cases that I knew about. In every case I saw, he had made a settlement, and he'd put bills in the file to make it look like he'd made a better settlement than he did, or something.

Q Just a minute, Mr. Noxon. You just said that if you ever saw a violation of an unfair claims practice, you would report it. Isn't altering a claims file a violation of the unfair claims practices?

A I'm telling you that I don't think Mr. Summers ever did anything to hurt those claimants [206] when he made those changes.

Q Now, answer my question. Isn't altering a file and doing phony memos a violation of the Unfair Claims Practices Act?

A It probably would be, yes.

Q But you didn't report him, did you?

A I didn't report him, no.

Q And you've always paid full fair value in all of your claims.

A I've always attempted to pay the fair value of claims.

Q And when you were superintendent and divisional superintendent, you always made sure that you authorized fair value when that was requested of you, right?

A I think that's part of my responsibility as a superintendent, and a divisional.

Q And you encouraged everyone to do so, as well, didn't you?

A Yes, I did.

Q And so you're saying that Samantha Bird is not telling the truth when she said she tried to get fair value out of you and you would not give it.

A No, I'm not saying Samantha Bird's not telling the truth. I'm saying that when you're [207] evaluating claims, this is not an exact science. And two people, you could have ten people in this room look at a claim, and you could have ten different values of what the claim is worth. The fact that Samantha thought a claim was worth this much and I thought it was worth this much, doesn't mean that she's wrong or I'm wrong.

Q So you think --

A I guess the final test on it is, I don't believe Samantha ever lost a case. So I don't see how she can say that I was always under evaluating her files. She settled them.

Q Do you recall when she came to you on a limits case, meaning a case had value far in excess of the policy limits, and you said, "Look, I'm getting heat from Pete White in general claims. Would you change your report," which had in it clear liability and damages in excess of the policy limits, and a request to settle for the policy limits. And you told her to rewrite it, and that, "We are going to defend this case"?

A I don't ever recall asking Samantha Bird to change a claim committee report. I can really see no reason to do that, because there's nothing wrong with her, a claim committee going in with her saying she ought to pay the amount and me

saying we should defend [208] it. That happens. I don't really see a problem with that, and I never asked her to change a report.

Q All right, so you deny what she said in that respect?

A I said that I've never asked Samantha to change a report, that's right.

Q And you would deny what Felix Jensen said when he said that, referring to you, that you had altered or changed documents in the files all the time. You deny that, as well?

A That's a lie, yes.

Q Okay. Have you ever heard of anyone at State Farm who has given less than fair value on a claim?

A No, I personally haven't, no.

Q I want to show you a video tape by Mr. Kertoch, it's a very short one, and it was out of the 1986 claim conference.

THE COURT: Why don't we stand up while Mr. Humpherys is setting up. Let's resume our seats.

(WHEREUPON a videotape was played before the jury, a transcription of which follows.)

"John Kertoch, auto claim counsel, who will speak to us on a subject entitled "Early Warnings." John has been in general claims for a long time, right, John?

[209] "But getting back to the problem, the problem turning up in my review, they can be grouped in two categories, and the two are intertwined. The two categories are fall-off in service and inadequate file investigation.

"Service. The accident happened June, 1981. After spending five continuous years in the body shop, the insured's vehicle, as of last month, still has not been repaired. The insured finally sued us, and why that insured was so patient, I do not know. It was obvious that there would be serious problems in the repair of this exotic car.

"Early on the insured requested that it be totalled. We ignored him and the suggestion. Early on it became

apparent there would be lengthy delays in securing parts, and lengthy delays in making repairs. After repeated partial repairs had been made, and continuing add-ons being required, someone should have done something to settle the claim.

"On at least five different occasions, when we had to tell the insured about add-ons or about delayed repairs, it was obvious that the vehicle should have been totalled. But at this time, during five years, did anyone look at the file to try to find an alternative solution, and to give the insured [210] satisfaction?

"No one, during the five years, checked if the vehicle was, in fact, a total loss. Nobody took the bull by the horns and gave that policy holder what he paid us for, service and protection.

"Now, that's not an isolated example. In fact, none of the problem cases I reviewed, including those that I'm talking about now, were isolated examples.

"We recently had a case with two default judgments of $500,000 each. There was, again, a delayed premium payment, and the question was whether or not the agent had committed us to coverage. The case was "claim committeed," and the decision was to file a declaratory action. The superintendent did not follow up with our defense attorney. The declaratory action was never filed, and the tort cases went into default.

"Now we are faced with demand to pay the two default judgments, one million dollars in punitive damages plus interest, plus attorney fees.

"I found many other examples that reflect badly on our claim handling. If you are doing your claim surveys, you know that I'm not telling you something you aren't already aware of.

"I could bore you by going over all of the [211] problems that I found, one by one, but I'm not going to insult your intelligence by doing that. You know what the situation is."

Q (BY MR. HUMPHERYS) Mr. Noxon, you heard Mr. Kertoch explain all of those cases, didn't you, in the '86 conference?

A Those two cases he just talked about there?

Q Yes.

A Yes.

Q And you heard him say those were not isolated cases, either, did you?

A Yes, I did.

Q So you have heard a number of times where State Farm has not fulfilled their duties to their insured, hadn't you?

A I thought you asked me if I felt that they'd been unfair, not paid fair value on their claims. I think he's talking about, there were two cases there where we had made mistakes on claims. And I've never said that we don't make mistakes on claims.

Q Who is Mr. Kertoch?

A Well, when I started in 1965, he was a divisional in northern Illinois where I worked. He became a general, when he did that, I believe he was a general claim consultant in the corporate offices, and [212] he's since retired. He lives in Arizona, I think.

Q So he was at the corporate office during the time of this tape, wasn't he?

A Yes, he would have been.

Q Now, we've had some testimony regarding appearance allowances, and I'd like to ask you a new question. This question isn't the new one, but the one following will be. Have you ever, as a divisional claim superintendent, did you ever emphasize the appearance allowance?

A I can't say specifically, but I would say yes, I probably have. I think one of our pride month goals was to see who could get the most appearance allowances. I don't really see that as a negative goal.

Q Do you recall even home office stressing the need to have appearance allowances?

A I honestly don't recall that coming from the home office. But I'm not saying that it didn't, but I don't recall that.

Q What are CORs?

A Claim operation reviews. That's a survey done by your home office consultant.

Q And isn't it true that in those CORs, corporate comes in and reviews the claim files, kind of like what Mr. Kertoch was saying he had been doing?

[213] A Well, I'm not sure what kind of a survey Mr. Kertoch did, but in a COR your zone consultant comes out and sits and reviews, you know, two or 300 files for various things, to see if proper procedures are being filed, followed. It's a very thorough review of your files, yes.

Q And it's for training, as well as for criticism and for patting you on the back when you do things right.

A Hopefully.

Q All right. I'd like to draw your attention to the January 14, 1986 claims operation review, the COR. Now, do you see that this was from John Martin? He held what position at that time?

A John Martin was the division manager, and I was the divisional claims superintendent.

Q This is your initial down at the bottom?

A It is, yeah.

Q Okay, I'm referring to pages 15 and other pages, 16 and those that follow, in Exhibit 137, which are Samantha Bird documents, where we obtained these.

All right, now, the typical process is that home office gives you notice they're coming in to review files. They do a massive review, they go back and they write a report about what they found, and the problems [214] they've seen, and what to correct. Is that a general statement?

A I would say that's a basic overview of the COR process, yes.

Q Okay. And then a letter is sent to Robert Bischoff, who at that time would have been the regional vice president, right?

A Yes, he was.

Q And that also would have been to Manuel Mendoza. I don't have the overview, but you can recognize his signature, can't you?

A Yeah, that's Manny.

Q Manny Mendoza to Robert Bischoff, regional vice president. Now, it's typical that these reports are fairly lengthy, isn't it?

A The COR followup, is that what you're talking about?

Q Yes.

A Yeah, when you survey that many files you're going to create several pages of followup.

Q I find it interesting that right here in the Logan claims office -- Again, this is the 1985 claims operation review --

MR. BELNAP: What page number?

MR. HUMPHERYS: This would be page number 31 [215] of Exhibit 137.

Q (BY MR. HUMPHERYS) Do you see right here, the criticism by home office regarding this particular file, "Looks like one where CSR should have tried for an appearance allowance on face bar." Isn't it true that the emphasis on appearance allowance comes right from the corporate headquarters?

A I guess I don't understand why you didn't read the rest of it. It talks about it being very minor damage on the bumper, and that's a perfect example of where an appearance allowance could be used.

Q Okay. I have no problem with reading the rest of it. That's not what I'm trying to address, Mr. Noxon. Let me ask my question again. Isn't it true that the emphasis on appearance allowance comes right from the top of this corporation?

A I think -- I think the emphasis, on most programs you're going to get direction from the home office. To say that, you know, a COR is done every couple of years, and they're going to comment on appearance allowances, just like they do on all of our programs. But to say they totally emphasize appearance allowances, or any one thing, I think is inappropriate.

Q I'm not suggesting that's all they emphasize. But they do emphasize that, don't they?

[216] A They did mention it, yes.

Q And it's not just for an awareness, isn't it?

A I think it's for an awareness, yes.

Q Now, Mr. Noxon, having reviewed the file, and the other information regarding the Campbell case, did it appear to you that everyone who was involved in that file on behalf of State Farm was acting within the scope of their duties as employees of State Farm?

A Absolutely they were.

Q And were all of the procedures followed by the State Farm employees consistent with State Farm policies, practices, and procedures?

A I've never seen any violation of any procedural guideline in that file, no.

Q And isn't it true that the way that file was handled, the Campbell file was handled, was also what you believe is consistent with the general practices in handling third-party claims at State Farm?

A I believe our general practices were followed precisely in the Campbell file, and that is to investigate and provide the insured a defense if we feel one is appropriate.

Q At any time, Mr. Noxon, did you see anything, having read the deposition of Mr. Bennett, having read the transcript, having read all of the depositions and [217] all else that you've said you reviewed, has there been anything that you saw where Wendell Bennett acted inappropriately in representing the Campbells?

A No, I never saw anything that I thought Wendell did that was inappropriate in his handling of that file.

Q Did you see anything where he acted inconsistent with the authority State Farm had given him in representing the Campbells?

A No, I did not.

Q At any time did you ever communicate with the Campbells that Mr. Bennett did anything which you thought was outside of the authority that you feel State Farm had given him to represent the Campbells?

A I did not. And as far as I know, no one from State Farm ever did.

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[218] * * *

Q The Gittens file, you've mentioned that you were told in early, or in September of 1981, that there was falsification by Ray Summers regarding portions of the file. And you also, Mr. Noxon, testified that you were alarmed regarding what had transpired in the Gittens file; is that right?

A Yes, I was. I didn't feel that was appropriate at all.

Q And these depositions where it was discovered, according to you, that Mr. Summers had been falsifying documents, were taken in August and September of 1981, weren't they?

A Those -- August and September were Ray's depositions? Or Mrs. Gittens?

[219] Q And the plaintiff's depositions.

A I believe that's right.

Q The depositions where it came out?

A I thought they were both in September, I guess, is my confusion. But I guess --

Q That may well be. I saw some notices that were dated in August, but I think the depos occurred in September, like you said.

A Okay.

Q Now, have you had a chance to review the actual Gittens file?

A No, I haven't.

Q Did you know that Mr. Bennett attempted to use that release to foreclose the Gittens claims, even though he knew that Mr. Summers had been dishonest in obtaining it?

A As I said, I did not review the Gittens file. If I reviewed it, I reviewed it in '81, and I wouldn't have known what happened with it after that.

Q In 1982 -- Let me just have you look over my shoulder, since we don't have the overheads of this. See, the Gittens versus Christensen. Christensen was the State Farm insured, right?

A Yes.

Q And Wendell Bennett was representing [220] Christensen in behalf of State Farm, right?

A Yes.

Q All right. Now, in 1982, August, Mr. Bennett requested that the Gittenses authenticate the releases which he had said in his answer was a defense to their claim. Let me go back so we have that established. Here's his answer. Do you see that? Answer to the complaint?

A Yes.

Q His signature? You see in paragraph 7 where he raises the defense that the plaintiff has executed a full and final and complete release? Do you see that?

A Yes, I do.

Q And he says here that the matter here being sued upon cannot be pursued.

A Yes.

Q So he is trying to defend the claim based upon the release. Do you see that?

A What's the date on this?

Q June 18 of 1981.

A That's before he became aware of Summers.

Q All right. Now, but in 1982, here he's requesting that the Gittenses authenticate the releases. Do you see that?

A That you executed the document.

[221] Q This is a request for admission.

A Okay. Yes.

Q Okay. Now, do you see where the Gittenses, in response, state, "In this action plaintiff has received settlement funds and has executed releases in favor of defendant. Even though she has been offered the option by defendant to repay the consideration received for the releases, and have the releases set aside so as to provide her with an opportunity to try the liability issues of the case, she has declined to make an election and has elected to continue to retain the consideration, and will continue to pursue her claim." Do you see that?

A I see that. I don't see what's wrong with that.

Q Okay, so State Farm --

A We offered to let her pay the money back that we had paid her that Ray said was an inappropriate amount, in exchange we would set the release aside.

Q And then you --

A She declined to do that.

Q And then you would fight her on liability at that point, wouldn't you?

A I don't think it says that at all.

Q So you were asking her to repay the money [222] back before you would set aside the release?

A That's what it says, yes.

Q Even though she'd spent the money on medical expenses and all that?

A I don't know what she spent the money on, if she spent it on medical. I guess I don't see anything wrong with that paragraph.

Q Now, in answer to the request for admissions, we have here the Gittenses say that they admit signing the release, but then she says, "I did not have time to read it before signing. Mr. Summers, the State Farm adjuster, came to the Smithfield Implement Store where I was working, gave me the check that I needed to pay for the replacement car, he gave me the documents in question, and told me I had to sign the release for the car payment, but that it left all of my medical claims open.

"I relied on Mr. Summers' representations and was under pressure from work and the need to pay for the car, so I signed without reading or checking with anyone what the document really was."

That was in 1982 when you saw that? Or do you remember?

A I don't remember seeing it.

Q You see it was dated in 1982.

[223] A Yes.

Q She had already spent and used the money that was obtained on the release, hadn't she, based on her answer?

A I have no way of knowing that.

Q But you were saying, "Unless you pay us the money back, we're not going to set aside the release," didn't you?

A I don't think that's unfair. We paid her a certain amount of money. If she wants to release that aside, I don't see what's wrong with saying, "You give us the money back, we'll set the release aside, and we'll start from square one.

Q You eventually settled the case, didn't you?

A I don't know.

Q I'll indicate that the documents were settled, it was in October of 1983, over a year after the request for admissions, and over two years after the case was filed.

A After those documents I read? I don't have those dates all still in my head.

Q All right. Well, I'll represent that's the date of the order of dismissal and stipulation signed. So you waited over two years to give this lady consideration for a release that was obtained by fraud [224] and deception, didn't you?

MR. BELNAP: Your Honor, that assumes facts not in evidence. Number one, it misstates the testimony of Mr. Summers, who claims that he created bills for money he paid to her.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Isn't it true, Mr. Noxon, that what we just read is that Mrs. Gittens was claiming that she trusted Mr. Summers when he told her that the claims would be left open for medical?

A That's what she claims, yes.

Q All right. And she claims that that wasn't true, because of the release, right?

A Yes, that's her claim.

Q And you didn't settle that claim until two and a half years after it was filed, did you?

A Again, I don't know that.

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